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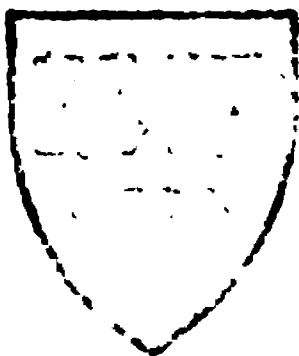
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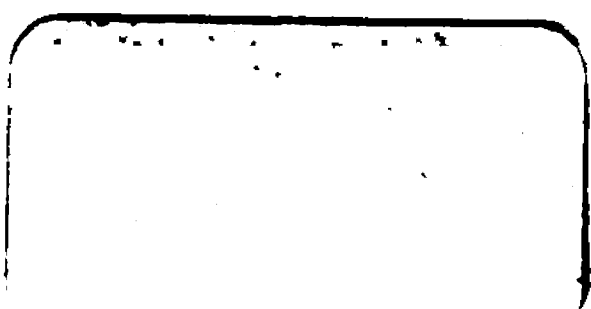
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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA.

APRIL 12, 1900—OCTOBER 3, 1900.

BY
BENJ. I. SALINGER.

VOLUME XXII,
BEING VOLUME CXI. OF THE SERIES.

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SCOTT M. LADD, SHELDON.

CHARLES M. WATERMAN, DAVENPORT.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA
AT
DES MOINES, JANUARY TERM, A. D. 1900.
AND IN THE FIFTY-FOURTH YEAR OF THE STATE.

STATE OF IOWA, Appellant, v. C. F. SANTEE.

Constitutional Law: PETROLEUM PRODUCTS: *Special privileges.* Code, Section 2508, prohibits the use of petroleum products for
1 illumination which emit a combustible vapor at a lower tem-
2 perature than 105 degrees Fahrenheit, closed test, except when
3 used in the Welsbach hydrocarbon incandescent lamp. *Held,*
5 that since there were other lamps equally safe, operated on the
6 same principle, and securing the same results as the Welsbach
7 lamp, the exception contained in such section was unconstitu-
9 tional, as a violation of Constitution, Article 1, section 6, pro-
hibiting the general assembly from granting to any citizen or
class of citizens privileges or immunities which shall not
equally belong to all citizens on the same terms.

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ABRIDGMENT OF PRIVILEGE OR IMMUNITY. Such provision is also in
4 violation of U. S. Constitution, Article Amendment 14, section

- 6 1, forbidding a state to pass a law abridging the privileges or immunities of citizens, or denying to its citizens equal protection of the law.

STATUTE VOID IN PART. Code, section 2508, prohibits the use of petroleum products for illuminating purposes which emit a combustible vapor at a lower temperature than 105 degrees Fahrenheit, closed test, except when the gas or vapor is generated outside the building to be lighted, but provides that such provision
2 shall not apply to such petroleum products used in the Welsbach hydrocarbon incandescent lamps. *Held*, that though such special exception was unconstitutional and void, as a special privilege, its invalidity did not invalidate the whole act, since such exception was not necessary to the completeness of the general prohibition of the statute.

CONSTRUCTION. Though an interpretation which will render a statute not obnoxious to the Constitution will be adopted if possible, this rule of construction does not warrant the forcing on the language of an act a meaning which upon a fair test is repugnant to its terms, nor taking from or adding to the plainly expressed language of the legislature.

Appeal from Polk District Court.—HON. C. A. BISHOP, Judge.

THURSDAY, APRIL 12, 1900.

AN information was filed against defendant for using gasoline in illuminating a building, without the use of the Welsbach hydrocarbon incandescent lamp or lamps. The case was tried to a jury in the district court, on appeal, upon a stipulation of facts, resulting in a directed verdict of not guilty, and the state appeals.— *Reversed*.

Milton Remley Attorney General for the state.

Thos. F. Stevenson and *Cummins, Hewitt & Wright* for appellee.

DEEMER, J.—The material part of the statute under which defendant was prosecuted reads as follows: "If any

person sell or offer for sale or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of not less than one hundred and five degrees standard—Fahrenheit thermometer, closed test, except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum when used in the Welsbach hydrocarbon incandescent lamp, he shall be punished," etc. Code, section 2508. It is agreed that the defendant used gasoline of a quality that would emit a combustible, vapor at temperature of less than one hundred and five degrees for illuminating purposes, that the vapor was not generated in closed reservoirs outside the building, and that he did not use it in Welsbach hydrocarbon incandescent burners. It is further agreed that the lamp used by the defendant was constructed on the same principle as the Welsbach, though not manufactured by the same company, and that it was constructed substantially as the Welsbach; that results were reached in substantially the same way, and by the same means; and that the lamps were the mechanical equivalent of each other. The attorney general contends that the exception or proviso found in the statute as to the character of lamp to be used in the use of the lighter products of petroleum means that the lamp must be the identical one therein referred to, and that defendant is guilty, on the admitted facts. He further contends that even if the proviso be found to be unconstitutional, as creating a monopoly, still the defendant is guilty, under the conceded facts, for the reason that, if the proviso be eliminated, then defendant had no right to use gasoline for illuminating purposes unless the vapor is generated outside the building that is to be lighted, while the defendant contends that the proviso in question relates, not to the Welsbach lamp, by name, but to any lamp constructed on the same general principles, and accomplishing the same general results with equal safety to

the public; that, if this be not true, the proviso is unconstitutional, and, if unconstitutional, then the whole act must fall; and that there is no prohibition against the use
3 of the lighter products of petroleum. If the proviso does refer to a specific lamp by name, it is undoubtedly unconstitutional, as obnoxious to article 1, section 6, of the constitution of Iowa, which provides that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities, which upon the same terms shall not equally belong to all citizens." Special privileges and monopolies are always obnoxious, and discriminations
4 against persons or classes still more so. The constitution of the United States forbids legislation by the states that shall abridge the privileges or immunities of the citizens of the United States, or deny to any persons within their jurisdiction the equal protection of the laws. If the attorney general's contention as to the proper construction of the words found in the proviso under consideration be correct, it is clear that such provision violates both the federal and state constitutions. *City of Chicago v. Rumpff*, 45 Ill. 90; *Mugler v. Kansas*, 123 U. S. 661 (8 Sup. Ct. Rep 273, 31 L. Ed. 205). Exclusive privileges and franchises may, no doubt, be granted, when absolutely necessary to insure safety to the people, but not otherwise. See
5 *Slaughter-House Cases*, 16 Wall. 36 (21 L. Ed. 394). In this case the parties agree, however, that there are other lamps, operated on the same general principle as the Welsbach, that are equally safe, and that secure the same results. This being true, the legislature has no power to select one and reject the other. To do so would be to create the most odious of monopolies. The statute under consideration was enacted in virtue of the police power of the state, but the legislature cannot under this guise create a monopoly. *Yick Wo v. Hopkins*, 118 U. S. 356 (6 Sup. Ct. Rep. 1064, 30 L. Ed. 220); *State v. Coke Co.*, 18 Ohio St. 262; *Mayor, etc., v. Thorne*, 7 Paige, 261;

Norwich Gaslight Co., v. Norwich City Gas Co., 25 Conn.

19. The business of manufacturing lamps, or the use of gas or vapor for illuminating purposes, is not unusual, and does not depend primarily on governmental permission. Defendant would have the right to use any lamp and kind of gas or vapor he chose for the purposes of lighting his building, in the absence of some police regulation imposed by the legislature; and a law that required him to use a particular lamp,

when others equally safe were in the market, would
6 be a violation of his constitutional rights and would

also give to the manufacturer special privileges over others producing equally meritorious lamps. If the state had bestowed a right on defendant, the prosecution of which was not a common, natural right, it might create a monopoly in this right; for with the abolition of the monopoly thus created would disappear all right to carry on the trade. Cool-ey, Torts, 77, 278. These views in no manner conflict with the rules announced in *Des Moines St. R. Co. v. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 513. There a mere privilege was granted by a city in the use of its streets. No question of natural right was involved. In the grant of special privi-

leges, no doubt, a monopoly may be created without
7 violating the constitutional inhibition. Do the words

contained in the statute, "the Welsbach hydrocarbon incandescent lamp," mean that particular lamp, or a lamp constructed on the same general principles, and reaching results in substantially the same manner? In construing the language of an act that is claimed to be unconstitutional, that interpretation will be adopted, if possible, which will not render it obnoxious to the constitution. But courts may not by construction import words into an act, nor make a statute read otherwise than as the legislature intended. In order to arrive at the legislative intent, a rule of construction is provided by Code, section 48, paragraph 2, which reads as follows: "Words and phrases shall be construed according to the context and the approved usages of the language. The

technical words and phrases and such other words as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning." In the stipulation of facts it is agreed that there is a lamp known to the trade as the "Welsbach Hydrocarbon Incandescent Lamp," and that there is another lamp, not so known, but constructed on the same general principles, and reaching results in substantially the same manner. Viewing the language of the statute in the light of these facts, it seems clear that the legislature had in mind the lamp known as the "Welsbach Hydrocarbon Incandescent," and not some other lamp, although operated on the same principle. To hold otherwise would be to import into the language used some other words, and give it an effect that was evidently not intended by the legislature. It does not appear how many lamps operated on the same general principles as the Welsbach were in existence when the act in question was passed, but the reasonable inference from the agreed statement of facts is

that there was at least one other kind known to the
8 trade. To avoid holding a statute unconstitutional, we are not warranted in forcing on its language a meaning which, upon a fair test, is repugnant to its terms. *French v. Teschemaker*, 24 Cal. 518; *Bigelow v. Railway Co.*, 27 Wis. 478. It is only where the language of the act will bear two constructions that a court is justified in applying a rule that will sustain the act, rather than one which will defeat it. There is no room for interpretation when the language used is plain and admits of but one meaning.

9 Consideration of the preceding acts of the legislature gives emphasis to the thought that the legislature, in passing the law in question, had reference to a particular lamp and not to a principle. By section 8 of chapter 185 of the Acts of the Twentieth General Assembly, no person was permitted to use the lighter products of petroleum for illuminating purposes, "provided that nothing in this act should be so construed as to prevent the use of machines or generat-

ors constructed on the same principle of the Davy safety lamp." This same language was carried into the proposed revision of the laws recommended by the code commission. See pages 507, 508, of their proposed code. For some reason the legislature did not adopt their recommendation, but, on the contrary, struck out the principle of a certain appliance, and specifically named the lamp by which the lighter products of petroleum might be burned. This, in connection with the language used, is convincing evidence that a particular lamp, rather than a principle, was referred to. There is nothing to indicate a contrary view, save the rule of construction to which we have heretofore referred. But

10 this rule of construction cannot be used for the purpose of adding to or taking from the plainly expressed language of the legislature. *Lake Company v. Rollins*, 130 U. S. 662 (9 Sup. Ct. Rep. 651, 22 L. Ed. 1060). None of the cases cited by appellee are in conflict with these rules. Without exception, those cases relate to acts that were susceptible of two constructions, one of which would render them obnoxious to the constitution, and the other in harmony with it. The latter construction was, of course, adopted. Here there is no room for construction, for the language is as clear as words can make it.

II. Finding, as we do, that the exception contained in the act is unconstitutional, the next inquiry is, what effect does this holding have on the act as a whole? Does it destroy it *in toto*, or does the act remain, with the exception

11 expunged? "It has been held to be sound construction of a statute that one section thereof is void and others valid, yet, if it evidently appears that one section is compensation or inducement for another, and the connection between them is such as to warrant the belief that the valid part would not have been passed alone, then the whole should be void." *City of Dubuque v. Chicago, D. & M. R. Co.*, 47 Iowa, 196; *Slauson v. City of Racine*, 13 Wis. 398. Again, it has been held that an act void in part is not necessarily

void *in toto*. If sufficient remains to effect its object without the aid of the invalid portion, the latter only shall be rejected, and the former will stand. *Warren v. Mayor, etc.*, 2 Gray, 84; *Poindexter v. Greenhow*, 114 U. S. 270 (5 Sup. Ct. Rep. 903, 962, 29 L. Ed. 185); *Santo v. State*, 2 Iowa, 205; *Fisher v. McGirr*, 1 Gray, 1; *Huntington v. Worthen*, 120 U. S. 97 (7 Sup. Ct. Rep. 469, 30 L. Ed. 588); *Com. v. Kimball*, 24 Pick. 361; *Clark v. Ellis*, 2 Blackf. 10. Some courts have said that, if an unconstitutional clause of a statute cannot be rejected without affecting the intent of the legislature, the whole statute must fall [*Pollock v. Trust Co.*, 157 U. S. 427 (15 Sup. Ct. Rep. 673, 39 L. Ed. 759); *Presser v. Illinois*, 116 U. S. 252 (6 Sup. Ct. Rep. 580, 29 L. Ed. 615); *Sprague v. Thompson*, 118 U. S. 90 (6 Sup. Ct. Rep. 988, 30 L. Ed. 115)] and that the two parts must be capable of separation, so that each may be read by itself, else the unconstitutional part will carry with it that which is constitutional. With these rules in mind, we turn now to the statute in question, and find that the legislature, in virtue of its police power, prohibited the use of the lighter products of petroleum for illuminating purposes, for all purposes whatever. Two exceptions to the general rule of prohibition are contained in the act, one of which is clearly valid, and the other is invalid. Is it likely that it would have passed an act containing the general prohibition, independent of this invalid exception? The two parts of the act are not dependent in terms. In other words, they may be separated, and the first may stand and is complete in itself without reference to the exception. If the act is to be declared null and void because of the unconstitutional provision, it must be on the theory that the act would not have passed, except as an entirety, and, that the general purpose of the legislature will be defeated if the general prohibition be held valid and the exception invalid. To solve this question, we should look to the history of the enactment. The Fourteenth General Assembly passed an act prohibiting the sale of the lighter

products of petroleum, without exception. See chapter 47. This act was carried into the Code of 1873 as section 3901. The Seventeenth General Assembly amended this law, and provided for the appointment of inspectors. See chapter 172. But the selling of the lighter products of petroleum was prohibited, without exception. The Twentieth General Assembly also amended the law by prohibiting the sale or use of the lighter products of petroleum for illuminating purposes, but introduced two exceptions,—one permitting the use of such products when generated outside of the building, in closed reservoirs, and the other permitting the use of machines or generators constructed on the principle of Davy's safety lamp. See chapter 185. So far, there is no right to use the lighter products of petroleum when the gas or vapor is generated in the building, unless, perhaps, it be in machines constructed on the principle of Davy's safety lamp. The exception now found in the statute that we hold contrary to the constitution was introduced by the General Assembly that passed the Code. From this hasty review of the different statutes, it will be observed that the general intent of the legislature was to prohibit the use of the lighter products of petroleum for illuminating purposes. That it had the power to pass a law which would accomplish this end there can be no doubt, and that such was its intent is equally clear. It will not do to say, therefore, that it would not have passed the act in question without the exception. To so assume would be to say that it intended to permit the sale or use of the lighter products of petroleum without let or hindrance. Such construction would be contrary to legislative policy existing for more than twenty-five years. The exceptions introduced into the acts from time to time do not indicate that the legislature intended to repeal pre-existing laws in the event these exceptions were held invalid. They were not the inducement that led to the passage of the general prohibitory laws. On the contrary, they were permissions granted under certain conditions, and, if these provisions proved ineffectual,

there is no ground for saying that the whole act was destroyed. The general prohibition was capable of enforcement, without reference to the exception, and the invalidity of the exception does not destroy the entire act. As sustaining our conclusions, see *Allen v. Louisiana*, 103 U. S. 80 (26 L. Ed. 318); *Field v. Clark*, 143 U. S. 649 (12 Sup. Ct. Rep. 495, 36 L. Ed. 294); *Willard v. People*, 5 Ill. 461; *Eells v. People* 5 Ill. 498; *Santo v. State*, *supra*; *Tiernan v. Rinker*, 102 U. S. 123 (26 L. Ed. 103); *State v. Amery*, 12 R. I. 64.

12 We are of opinion that the defendant is not using the lamp authorized by law, and that if the exception found in the statute is unconstitutional, as it clearly is, still there is a general prohibition against the use of lighter products of petroleum for illuminating purposes when the gas or vapor thereof is generated inside the buildings to be lighted, and that, under the agreed statement of facts, defendant was guilty. While we cannot, by reversing the case, in any manner affect the status of the defendant, yet in order that a correct rule of law may be established, we are constrained to disagree with the learned trial judge, and his order directing a verdict is REVERSED.

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ANDREW RIEGEL, Appellant, v. E. S. ORMSBY.

Reformation: ESTOPPEL TO DEMAND. Where mortgages, deposited with trustees to secure debenture bonds of a certain company, were executed so as to render the person signing them personally liable, purposely to conceal the fact that they were the obligations of the company, such person, though holding merely the naked legal title to the property pledged, and receiving no consideration for signing the obligations, is without standing in a court of equity to ask a reformation of the mortgages so as to be relieved from personal liability, even though all the facts had been known to the trustees and purchasers of the bonds.

ASSIGNMENT BY ONE WITHOUT KNOWLEDGE OF DEFENSE: *Assignee with knowledge.* The fact that when one purchased paper he

was informed that the person who signed it claimed not to be
4 personally liable thereon cannot avail the latter when sued
thereon, where such purchaser's assignor had the right to en-
force such personal liability.

Contracts: CONSIDERATION. The detriment to the promisee is a
sufficient consideration to support an obligation purchased on
5 the strength of the promisor's execution thereof, as against
the latter, even though he received no consideration.

Representations: ESTOPPEL TO DENY. Where an advantage has been
acquired because of representations made by one, he cannot
4 be heard to say that those representations were not true.

Signatures: PERSONAL LIABILITY. The signature to an instrument,
1 "E. S. O. Trustee," creates a personal liability of the signer of
2 such instrument.

Appeal from Palo Alto District Court.—HON. W. B. QUAR-
TON, Judge.

THURSDAY, APRIL 12, 1900.

ACTION to recover upon certain agreements extending
the time of payment of four promissory notes, in which said
agreements it is claimed defendant assumed and promised to
pay such notes. The agreements were signed by E. S.
Ormsby, trustee, and the defense is that he is not personally
liable thereon, and by cross bill it is asked that they be re-
formed. The cause was tried as an equitable action. There
was a decree in defendant's favor, and plaintiff appeals.—
Reversed.

J. G. Myerly for appellant.

B. E. Kelly and *Carr & Parker* for appellee.

WATERMAN, J.—The case was submitted in great part
upon stipulated facts. The statement in the record is so
lengthy we shall venture to abridge it. Some additional
matters of which testimony was taken will be noticed in the
course of the opinion. In the year 1884 the defendant was
a member of three firms, each of which was engaged in the

real estate and loan business. The place of business of one of these firms was at Emmetsburg, in this state; the other two were located in South Dakota. The Dakota firms had made loans to and taken notes secured by deeds of trust upon real estate from Daniel R. Haynes, Patrick Kelley, Jesse H. Conrad, and Josiah W. Lamb, respectively. The defendant was the trustee named in these deeds. In June, 1885, the American Investment Company was organized, and absorbed the business of all these firms. Defendant was president of the company until July 1, 1891, and thereafter was a member of its board of directors. In each of the loans mentioned except that of Kelley, the borrowers gave notes for commission, and executed second mortgages to secure their payment. Default having been made by each of these four debtors, foreclosure proceedings were instituted, the real estate sold, and title taken in the name of E. S. Ormsby, trustee, but without his knowledge at the time. In all except the Kelley case the foreclosure was had of the commission mortgages. In the Kelley matter the foreclosure was of the principal mortgage, the only one given. The investment company took up these various loans, and defendant, in his name, as trustee, executed new interest notes or coupons in each of these cases covering a period of five years after the date of the maturity of the original notes. In each of these coupons the principal note was described, followed by this agreement, "Which note I assume and agree to pay." These interest notes were signed, "E. S. Ormsby, Trustee." A separate agree-
1 ment as to each note was also signed in the same manner by defendant, and also by the original payee, in which the time of payment of the principal was extended for the period just mentioned; and in this agreement it was recited that Ormsby, trustee, was the owner of the land. Prior to this time, the investment company, desiring to issue its debenture bonds for sale on the market, undertook to make provision for securing their payment, and to do this it appointed George H. Carr, Elden J. Hartshorn, and John

J. Watson, trustees, who, by agreement, were to take and hold securities as collateral for the benefit of purchasers of such bonds. These notes, with the extension agreements and the new interest coupons, were in due time deposited with the trustees as collateral, and together with other paper, and debenture bonds aggregating a large amount were placed on the market and sold. The original notes in question were payable two to one Higgins, and two to one Graves, and were endorsed by their respective payees in this form: "Pay to the order of ———, without recourse," and this was duly signed. In December, 1896, the investment company, having defaulted in the payment of its debenture bonds, the trustees named, Carr, Hartshorn, and Watson, sold the collaterals at public sale, and plaintiff purchased, and now owns, the Haynes, Conrad, Lamb, and Kelley notes, with the agreements relating thereto, of which we have spoken. This action is an attempt to enforce a personal liability against Ormsby.

II. On the face of these papers Ormsby is personally liable. Counsel do not disagree as to this. The ultimate question presented for our determination is as to defendant's right to have the contracts reformed. Preliminary
2 to this, however, a number of other issues are raised by the defense. It is maintained that these extension agreements and promises to pay, made by Ormsby, were without consideration; that the papers sued on were non-negotiable; that Ormsby was not the real owner of the real estate covered by the mortgages, but held only the bare legal title for the benefit of the investment company; that he did not intend to incur any personal responsibility in signing the agreements and coupons; that the liability thereon was in fact that of the investment company, and that the trustees for the debenture creditors knew these facts when they received this paper; and it is claimed this notice to the trustees will, in law, be deemed notice to their *cestuis que trust*. Upon the question whether notice to trustees of this character

is notice to the beneficiaries, the authorities seem to be in conflict. As we dispose of the controversy on other grounds, we need not analyze the cases, nor do more than say that in each of those cited by defendant the question arose between creditors whose rights were in conflict, while here the issue

is between a creditor and one who had a duty to perform in creating the trust. But, for the purpose of

3 this case, let us say the holders of the debenture bonds were bound by any knowledge had by the trustees of facts which affected the validity of such securities, and it then becomes necessary to determine what the facts were as to the execution of these papers by Ormsby, and what knowledge the trustees had. These securities purported to be real estate mortgages, with the personal obligation of Ormsby added. There was a deliberate purpose in having them signed as they were instead of by the investment company. The president of the company, a brother of defendant, and who testified in his behalf, says: "I think the reason we made these extensions in the name of E. S. Ormsby, trustee, instead of the name of the American Investment Company, was that some of them went east to eastern holders of first mortgages, where we held title, or the title was in the name of C. E. Bliven, trustee, or E. S. Ormsby, trustee; and I think we wished them to think as much as possible that it was a straight loan,—all right; that it was *bona fide* collateral; where, if we put them in the name of the company, they might have thought it was not a *bona fide* collateral security. We did not do it particularly to deceive our customers. We guaranteed them, and expected to pay them." If this means anything, it means that these papers were executed by Ormsby so that it might not be known they were obligations of the investment company. While it is true, defendant does not admit this, his denial is hesitating, and not direct, and the statement of the president is corroborated by all the surrounding circumstances. Although in three of the instances these papers might have been treated as col-

lateral, even though the agreements had been signed by the investment company, because real estate was pledged, they would have lacked any personal obligation on the agreements outside that of the principal debtor, who was already bound. But in one case—that of Kelley—the principal mortgage had been foreclosed. The note was merged in the judgment, and we have nothing to show but that the judgment was paid by the purchase of the land on foreclosure. Had the investment company signed the agreement in this case, it would not have been any security at all. And in none of the cases would the collateral have been the same, or so valuable, as it would with the obligation of some third person added.

Digressing now for a moment, let us see what the trustees had notice of in relation to this matter. Watson is the only one of them who testifies on this point. He says: "I knew, at the time of taking these securities, that the American Investment Company held the legal title to these lands, and that they had taken up these securities, and that they were the owners of both land and securities. Also that defendant held the naked legal title for the company, and that he received no consideration for signing these extension agreements; that is, I knew it in a general way. * * * We did not consider the question of holding E. S. Ormsby personally liable. * * * At the time we received these papers, I did not consider E. S. Ormsby was personally responsible on them." It will be noticed that the witness does not say that he or any of the trustees knew or suspected that the papers were executed in Ormsby's name purposely to conceal the fact that they were the obligations of the investment company. But, if the facts shown by the testimony had all been known to the trustees or bondholders, then knowledge could not aid plaintiff. When these agreements were deliberately executed in the manner adopted for the purpose of inducing the bondholders to believe they were the obligations of a third party, it leaves Ormsby without stand-

ing in a court of equity to ask a reformation that will exonerate him from liability. The conduct of the parties
4 was, in effect, a representation that the investment company was not liable on this paper; that the agreements were the obligations of Ormsby. After acquiring an advantage on the strength of such representation, we cannot understand how Ormsby can be now heard to say these representations were not true. Granted, for the sake of argument, that plaintiff was informed, when he purchased this paper; that Ormsby claimed not to be personally liable thereon, and how does this avail? Ormsby can claim no greater right against plaintiff than against plaintiff's assignors. Had the intention been to express the liability of the investment company by the execution of those agreements, and the failure occurred through mistake of law or fact, doubtless a reformation could be had at Ormsby's instance. *Bank v. Swan*, 100 Iowa 718; *Lee v. Percival*, 85 Iowa, 639. This, however, is not the case. As we have shown, there was no mistake. The manner of execution expressed just what was intended. To permit a reformation here would be to allow defendant to take advantage of his own wrong, and, if no reformation is had, plaintiff is entitled to recover (*Bank v. Swanson, supra*, and cases therein
5 cited), for there was a sufficient consideration for the promise in the detriment to the promisees, the bondholders. The decree of the district court must be REVERSED.

GEORGE WISE, Appellant, v. ADELINE SCHLOESSER, Appellee.

Vacation of Judgment: MINORS: *Breach of promise.* Code, section 3482, provides that no judgment can be rendered against a
1 minor, unless defended by his regular guardian, or one appointed by the court. *Held*, that a judgment for breach of marriage promise rendered against a minor, without a defense by a guardian, was erroneous.

SAME: *Judgment in action for seduction.* Where, in proceedings to vacate a judgment against a minor for breach of promise and seduction, not defended by a guardian, it was admitted
3 that he had a meritorious defense to the seduction and the judgment was vacated as to the breach of promise, it was error to sustain that portion of the judgment which was founded upon the alleged seduction, though an action for seduction will lie against an infant without defense by guardian.

"ERROR APPEARING IN THE RECORD" DEFINED. Under Code, section 4091, providing that the district court may vacate a judgment against a minor, for erroneous proceedings, unless the error appears on the record, if application is made therefor within a
2 year after the minor attains his majority, a minor is not precluded from maintaining such a proceeding, commenced within the year, by the fact that he testified in the former case that he was not 21 years old; as this was not part of the record, in the sense of this statute.

Evidence of Flight: SEDUCTION AND BREACH OF PROMISE. At the time when the defendant is said to have left the county no such suit had been begun or threatened and defendant returned as soon
4 as he learned of the suit. *Held,*

- a. Whatever the rule may be in actions for seduction such evidence is not admissible when the gist of the action is breach of promise or contract.
- b. Without deciding whether evidence of flight is admissible in a civil case, it should not have been received here.

Appeal from Dallas District Court.—HON. J. H. APPLE-
GATE, Judge.

THURSDAY, APRIL 12, 1900.

DEFENDANT procured a judgment against plaintiff for breach of promise and seduction. This is an application to reverse, set aside, and vacate that judgment on the ground that when it was rendered plaintiff was a minor, and was not defended by guardian. Plaintiff also alleges that he has a good defense to the action in which the judgment was rendered, and that various errors were committed by the court in the trial of that action. The trial court set aside the original judgment in so far as it was

based on the alleged breach of promise, but allowed it to stand in so far as it was based on the alleged seduction, and plaintiff appeals.—*Reversed.*

Shortley & Harpel and *Edmund Nichols* for appellant.

White & Clarke for appellee.

DEEMER, J.—At the time the original judgment was rendered against plaintiff, he was a minor. No guardian appeared to defend nor was a guardian *ad litem* appointed for him. Within a year from the time judgment was rendered, and within a year after plaintiff arrived at the age of majority, he commenced this action, based on the grounds—*First*, that the judgment was and is erroneous because no guardian was appointed to defend; and, *second*, because of errors occurring during the trial of the main case.

1 For the purpose of the case, it is agreed that plaintiff is able to show a meritorious defense to defendant's cause of action, if a new trial be awarded; and it is also agreed that, on the trial of the main case, plaintiff testified that he was not then twenty-one years of age. Code, section 3482, provides that the defense of a minor must be by his regular guardian, or by one appointed to defend him, where no regular guardian appears, or where the court directs a defense by one appointed for that purpose. "No judgment can be rendered against a minor, until after a defense by the guardian." Section 4091 of the Code also provides that: "Where a final judgment or order has been rendered or made, the district court * * * may after the term at which the same was rendered or made, vacate or modify the same or grant a new trial. * * * (3) for erroneous proceedings against a minor * * * when such errors * * * do not appear in the record; or * * * (6) for errors in the judgment or order shown by a minor within 12 months after arriving at majority." Plaintiff's application was timely, and the first question that arises is, is he

entitled to a new trial because no guardian appeared or was appointed to defend? The first section of the Code, heretofore quoted, expressly provides that defense for an infant must be by guardian, and that no judgment can be rendered against him until after such defense. A judgment against an infant without defense by a guardian is clearly erroneous. *Drake v. Hanshaw*, 47 Iowa, 291; *Myers v. Davis*, 47 Iowa, 325; *Bickel v. Erskine*, 43 Iowa, 213; *Hoover v. Plow Co.*, 55 Iowa, 668; *Dohms v. Mann*, 76 Iowa, 723.

2 Plaintiff's testimony in the main action that he was a minor does not make that fact of record. Evidence adduced on trial is not the record referred to in section 4091 of the Code. As the proceedings against plaintiff were erroneous, he was entitled to a new trial. *Dohms v. Mann*, *supra*; *Foundry Co. v. Doty*, 42 Vt. 412; *Johnson v. Waterhouse*, 152 Mass. 585 (26 N. E. Rep. 234, 11 L. R. A. 440); *Wickersham v. Timmons*, 49 Iowa, 267; *Webster v. Page*, 54 Iowa, 461; and *Bickel v. Erskine*, 43 Iowa, 213, are not in point, for in each case there was a defense by guardian before the judgment was rendered. Although we have no means of knowing the court's view of the matter, it seems that it must have held that a judgment against a minor for breach of promise could not be sustained, but that an infant is liable for seduction, and therefore there was no error in rendering judgment against him, although no guardian had been appointed. That a minor cannot
3 be held liable for breach of promise seems to be well settled, and it is also clear that he may be held for seduction. *Rush v. Wich*, 31 Ohio St. 521; *Hunt v. Peake*, 5 Cow. 475; *Becker v. Mason*, 93 Mich. 336 (53 N. W. Rep. 361); *Fry v. Leslie*, 87 Va. 269 (12 S. E. Rep. 671); *Reish v. Thompson*, 55 Ind. 34. But the error in the court's ruling is due to the fact that it is conceded that plaintiff has a meritorious defense to the alleged seduction.

II. On the trial of the main action, defendant was permitted to offer evidence tending to show flight of the plaintiff

after he was accused of the wrong. Claim is made that evidence of flight is not admissible in a civil case, and that, if admissible, the evidence offered in this case was too remote from the principal transaction. At the time defendant in that case (plaintiff in this) is said to have left the country, no suit had been commenced against him, nor had any threat been made that action would be brought against him either for breach of promise or for seduction. Whatever may be the rule regarding the admission of such evidence in actions for seduction, we are of opinion that such evidence is inadmissible when the gist of the action is breach of promise or contract. Moreover, the evidence shows that as soon as plaintiff learned of the commencement of the main suit he returned to the county of his residence, and appeared at the trial. We are not holding that evidence of flight is admissible in a civil case. On that point we express no opinion. But, if it is, we do not think the evidence in this case relating to plaintiff's conduct should have been received. *Hopkins v. Mathias*, 66 Iowa, 333, while not deciding the point, sustains our conclusions. We are of opinion that a new trial should have been granted on both grounds, and the judgment is REVERSED.

F. D. CURTTRIGHT V. THE INDEPENDENT SCHOOL DISTRICT
OF CENTER JUNCTION, JONES COUNTY, IOWA,
Appellant.

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Resignation of Teacher: ACCEPTANCE. The tender of a resignation by a teacher, under contract to teach in a certain district, being
1 a mere offer, is not binding on either party to the contract
2 until accepted, and it may be withdrawn at any time before it is acted on by the district board.

SAME. The fact that a tender of a resignation by a teacher under
2 contract to teach in a district was handed to the president of the district board, and retained by him, did not constitute an acceptance thereof, where it remained for the board to act on the tender.

ABANDONMENT OF CONTRACT. The fact that a teacher under contract to teach in a certain district handed in his resignation at the close of a term, drew the pay that was due him and delivered
2 up the key of the school house on demand of the district board, is insufficient to show an abandonment of the contract where he afterwards, and before the commencement of the next term, withdrew his resignation prior to its acceptance.

DISCHARGE OF TEACHER. In an action by a teacher against a school district for damages for breach of contract, it appeared the plaintiff tendered his resignation, but withdrew it before it was accepted, and the district board thereupon formally accepted the resignation. *Held*, that the claim of defendant that, if there was
3 no resignation before the board, its action was an order of discharge, under Code, section 2782 (Code 1873, section 1734), authorizing district boards to discharge teachers for incompetency. and after an investigation at a meeting convened for that purpose, at which the teacher may be present, and make his defense, and that plaintiff, not having appealed from the order of discharge to the county superintendent, as provided by Code, section 2818 (Code 1873, section 1734), could not maintain the action—was untenable, it not appearing that any complaint was made against plaintiff, or that he was called on to make any defense.

Appeal from Jones District Court.—HON. H. M. REMLEY,
Judge.

THURSDAY, APRIL 12, 1900.

ACTION to recover damages for an alleged breach of a written contract. The defendant answered, denying the alleged breach and that plaintiff was damaged. It was agreed on the trial that, if plaintiff is entitled to recover at all, it is in the sum of two hundred and fifty dollars. At the conclusion of the evidence the court, on motion of the plaintiff, directed a verdict in his favor for two hundred and fifty dollars and rendered judgment thereon. Defendant appeals.—*Affirmed.*

Jamison & Smyth for appellant.

B. H. Miller for appellee.

GIVEN, J.—I. The plaintiff and the defendant's board of directors entered into a contract, whereby the plaintiff agreed to teach the public school in said district for the term of thirty-six weeks commencing September 6, 1897, in consideration of which the defendant agreed to pay to him fifty dollars per month. The plaintiff took charge of the school, and continued to teach it up to Friday evening, December 10, 1897, from which time there was to be and was a vacation of the school until January 3, 1898. On January 3, 1898, the plaintiff was present, ready and willing to continue to perform the duties of teacher under said contract, but was

1 forbidden to and prevented from doing so by the defendant's said board for the following reasons: On December 8, 1897, the plaintiff delivered to A. McDonald a writing as follows: "Center Junction, Dec. 8, 1897. To A. McDonald, Center Junction, Iowa, President of Board of Education: I hereby tender my resignation as principal of schools. It has been made plain to me that the progress of the children is somewhat retarded by my position. To stand in their way would be an injustice to them. Therefore, in the interests of school harmony, I tender this, to take effect Friday evening, Dec. 10. Wishing my successor abundant success, I am the same, F. D. Curttright." President McDonald called a special meeting of the board for Saturday evening, December 11, 1897, and after the members of the board had convened, and before said tender of resignation had been acted upon, the plaintiff placed upon the secretary's table a writing as follows: "To the Board of Education: After much urgent solicitation on the part of my many friends, I hereby withdraw my resignation, and so remove further agitation. F. D. Curttright." The record of that meeting shows as follows: "The president requested the secretary to read the resignation to the board, which was done; also F. D. Curttright's withdrawal. Geo. L. Felton made a motion that the withdrawal be accepted. No second. The president said the resigna-

tion must come before the board first, and be acted upon. Geo. L. Felton made a motion, if the board accepted F. D. Curttright's resignation, that they close the school for the balance of the school year. No second. J. N. Smith made a motion that the board accept F. D. Curttright's resignation. McDonald seconded the motion. Carried." On December 13, 1897, an order was drawn on the treasurer, and delivered to the plaintiff, for twenty-three dollars and seventy-five cents, the balance due him up to the commencement of the vacation, and this order was paid to him December 16th.

II. Appellant's first contention is that the paper of December 8th "is in fact and in law a renunciation of the contract upon his part, and terminated all right of the plaintiff to in any manner enforce the contract." A number of authorities are cited to the effect that, having renounced the contract, the plaintiff cannot recover for the refusal on the part of the defendant to thereafter perform it. We do not so construe this writing. It is simply a tender—an offer—to resign, to terminate the contract, and, until accepted, was not binding upon either party. If it had been accepted, both parties would have consented to the termination of the contract, but, if not accepted, both would continue to be bound by it. Being a mere offer, the plaintiff had the right to withdraw it at any time before it was acted upon by the defendant's board, and this he did; wherefore it was as if no such offer or tender had been made, and at the time the board acted it had no such offer to act upon. We do not think that this writing, nor the fact that the plaintiff drew the balance of pay due to him, nor that he delivered the key of the school house, on demand of the board, prior to January 3d, shows an abandonment of the contract. He drew his pay to the end of the year because it was due to him, and delivered up the key because it was demanded of him. The fact that the tender of resignation was handed to the president, and retained by him, did not

constitute an acceptance of it, as was the case of *Gates v. Delaware Co.*, 12 Iowa, 405, for the reason that in this case it remained for the board to act upon the offer while in that no further action was required. The principles involved in this inquiry are so elementary as to require no further citations.

III. Appellant's next contention is that if, by reason of the withdrawal, there was no resignation before the board, then their action was an order of discharge, under section 1734 of the Code of 1873 (section 2782, present Code), and that this action will not lie, plaintiff not having appealed from the order of discharge to the county superintendent, as provided in section 1829, Code 1873 (section 2818, present Code). Said section 1734 (section 2782) provides: "In case a teacher employed in any of the schools of the district township is found to be incompetent, or is guilty of partiality or dereliction in the discharge of his duties, or for any other sufficient cause shown, the board of directors may, after a full and fair investigation of the facts of the case, at a meeting convened for the purpose, at which the teacher shall be permitted to be present and make his defense, discharge him." Said section 1829 (section 2818) provides that any person aggrieved by any decision or order of the board in a matter of law or fact may appeal to the county superintendent. Section 1836, Code 1873 (section 2820, present Code), provides that the county or state superintendent shall not have authority "to render judgment for money." Said proceedings of December 11th were not intended to be, and were not, in fact, in pursuance of the provisions of said section 1734 (section 2782). No complaint of incompetency, partiality, or dereliction of duty was made against the plaintiff, nor was he called upon or permitted to defend against such accusations. The relief sought in this case is exclusively a money judgment, and this the county superintendent had no power to grant. *Kirkpatrick v. School Dist.*, 53 Iowa, 585, is not in

point, as that was a proceeding under the statute to discharge the teacher. As to appeals from orders of the board, see *Perkins v. Board*, 56 Iowa, 476; *Rodgers v. School Dist.*, 100 Iowa, 317; *Burkhead v. School Dist.*, 107 Iowa, 30. Our conclusion is that there was no error in directing a verdict for the plaintiff, and the judgment is therefore **AF- FIRMED**

GERMAN STATE BANK, Appellant, v. O. F. HERRON, Sheriff.

Tenancy at Will: POSSESSION AFTER TERMINATION OF WRITTEN LEASE.

Where a tenant from year to year continues in possession of leased premises with the assent of the landlord, after the termination of the lease, he becomes a tenant at will, under Code, 1 section 2991, providing that any person in possession of real estate with the assent of the owner is presumed to be a tenant at will until the contrary is shown. The contract creating the relation of landlord and tenant is implied in every respect as before save that of duration, and payment was due as provided in the written lease.

NOTICE TO TERMINATE: Sale of premises. Under Code, section 2991, requiring that thirty days' notice in writing must be given by 2 either party, to terminate a tenancy at will, the conveyance to one as trustee, by the landlord of premises held by a tenant at will does not terminate the tenancy.

LIEN FOR RENT. The lien for rent under a tenancy at will, resulting from possession after the termination of the written lease, reaches ahead only for the length of time necessary to end a 3 tenancy by notice, and such lien is junior as to rent described below to that of a mortgage on property kept on the leased premises, which mortgage is executed after the termination of the written lease and prior to the accrual of rent due.

RULE APPLIED. On April 24, 1896, a tenant at will executed a chattel mortgage on his personal property located on the leased premises. The landlord conveyed the premises to a trustee on January 1, 1898, and also assigned to the trustee unpaid rent. The rent was paid until January 1, 1897. On April 26, 1898, the trustee instituted proceedings for the recovery of the rent, aided by a landlord's attachment. The property attached was replevied by the plaintiff under his chattel mortgage. *Held*, that

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under Code, section 2991, requiring thirty days' notice in writing, to terminate a tenancy at will, the lien of the landlord for unpaid rent reached ahead only for the term required to terminate the tenancy, and hence the lien of the plaintiff was superior to that of the landlord.

Appeal from Plymouth District Court.—HON. F. R. GAYNOR, Judge.

THURSDAY, APRIL 12, 1900.

ACTION in replevin. Judgment for defendant. Plaintiff appeals.—*Reversed.*

Sammis & Scott for appellant.

McDuffie & Keenan and *Ira T. Martin* for appellee.

LADD, J.—Steiner, as owner, rented the premises to Berner, by written lease, for two years, beginning February 20, 1892; and, without any other agreement, the latter held possession until April 26, 1898. He paid the stipulated rental of sixty-five dollars per month up to January 1, 1897, but nothing since. Berner occupied the building with a stock of jewelry, watches, clocks, etc., and on April 24, 1896, executed to the German State Bank a chattel mortgage thereon to secure an indebtedness of five thousand dollars. On January 1, 1898, Steiner conveyed the premises to Koenig, trustee, and, at the same time assigned to him the written lease, and his claim for rent due. Koenig instituted suit April 26, 1898, for the unpaid rent, aided by a landlord's writ of attachment, under which the defendant, as sheriff of the county, held the property; and from him the plaintiff replevied it, under its chattel mortgage, three days later. Three questions are argued: (1) Was Berner in possession under the terms of the written lease at the time the chattel mortgage was executed? (2) If so, was that tenancy terminated by the conveyance to Koenig, trustee? And (3) is the lien for rent under a ten-

ancy at will superior to that of a chattel mortgage executed after the termination of the written lease, but prior to the accruing of the rent due? For convenience, the last may be disposed of first. At the expiration of the term, Berner, who continued in possession with the assent of his landlord, became, under our statute, a tenant at will. *O'Brien v. Troxel*, 76 Iowa, 760; *City of Dubuque v. Miller*, 11 Iowa, 583. There is no reason, however, for extending the statute beyond its terms. Under the law as it formerly stood, a tenancy from year to year, or for a less time, when definitely fixed, as the term in the lease, was implied from the tenant holding over with the assent of the landlord; and this under the same conditions as specified in the contract, in so far as applicable to the new situation. *Herter v. Mullen*, 159 N. Y. 28 (53 N. E. Rep. 700, 70 Am. St. Rep. 517); *Mason v. Wierengo's Estate*, 113 Mich. 152 (71 N. W. Rep. 489); *Crommelin v. Thiess*, 31 Ala. 412 (70 Am. Dec. 499); *Goldsborough v. Gable*, 140 Ill. 269 (29 N. E. Rep. 722, 15 L. R. A. 294); *De Young v. Buchanan*, 32 Am. Dec. 156; *Diller v. Roberts*, 15 Am. Dec. 578. This doctrine has even been extended to leases void as against the statute of frauds, where evidence may be introduced establishing them. *Loughran v. Smith*, 75 N. Y. 205, *Marr v. Ray*, 151 Ill. Sup. 340 (37 N. E. Rep. 1029, 26 L. R. A. 799). The contract creating the relation of tenancy is implied in every respect as before, save that of duration, and Berner was bound to payment according to the provisions of the written lease. See *Huntington v. Parkhurst*, 87 Mich. 38 (49 N. W. Rep. 597).

II. Anciently a tenancy at will might be put at an end at the pleasure of either party. This was often oppressive to the tenant, as he might be deprived of possession before his crops had matured, and thereby subjected to much inconvenience in gathering them. It interfered with the proper cultivation of the soil. To obviate possible hardship, the courts construed every occupancy of land, where the relation

of landlord and tenant existed, not under the terms of a lease, as a tenancy from year to year, which could only be terminated on reasonable notice. In *Phillips v. Covert*, 7 John, 3, it was even held that a tenancy at will could not be created. The settled doctrine, however, seems to have been that while every occupation of land was to be deemed, *prima facie*, a tenancy from year to year, yet it might be shown to be a tenancy at will, or for any fixed period. *Stedman v. McIntosh*, 42 Am. Dec. 122. These rules were developed when agriculture was the main pursuit, and before other interests had assumed their present importance. While the statute still protects those in possession of land for the purposes of cultivation, it also affords protection to the owners and tenants of other property. "Any person in the possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown, and thirty days' notice in writing must be given by either party before he can terminate such a tenancy; but when, in any case, a rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such interval. In case of tenants occupying and cultivating farms, the notice must fix the termination of the tenancy to take place on the first day of March, except in cases of mere croppers, whose leases shall be held to expire when the crop is harvested; if the crop is corn, it shall not be later than the first day of December, unless otherwise agreed upon." Section 2991, Code. The justice of these provisions is illustrated by the case of *Mason v. Wierengo's Estate*, 113 Mich. 152 (71 N. W. Rep. 489), where a lessee, owing to sickness, held over eleven days, and because of this was adjudged liable for an additional year's rent. See, *contra*, *Herter v. Mullen*, *supra*. The effect of this section is to enlarge estates at will so as to include those formerly implied from year to year. The same reasons for requiring notice to terminate such a tenancy exist as before the change. At the common law, Berner would have been a tenant from year to year, and his tenancy

might not have been ended by a sale of the premises. *Kitchen v. Pridgen* (N. C.), 64 Am. Dec. 593. See note to *Stedman v. McIntosh*, 42 Am. Dec. 126. It was otherwise with an estate at will. *Esty v. Baker*, 50 Me. 325 (79 Am. Dec. 617); *Dame v. Dame*, 38 N. H. 429 (75 Am. Dec. 195);

2 *Howard v. Merriam*, 5 Cush. 563. See *Fischer v. Johnson*, 106 Iowa, 181. But the statute seems to have been framed to meet the exigencies of the present time, and to be broad enough to cover all cases. It is imperative in exacting notice before any estate at will may be terminated. To hold that this might be obviated by selling the land would sanction a clear evasion of the letter as well as the spirit of the law. True, in *Esty v. Baker, supra*, a sale was adjudged to have that effect; but the act under which that case was decided was permissive in the matter of notice, and did not purport to do away with implied tenancies from year to year. Besides, stress was laid on the fact that the tenancy was one at will, under the common law, without payment of rent. *Young v. Young*, 36 Me. 133, is more in point. There the tenant had committed waste, which at common law, *ipso facto*, ended the relation; and it was adjudged that this did not destroy the tenancy, in the absence of statutory notice. The principles of sound policy require that estates implied under this statute be not terminated by either party without the notice prescribed. Thus alone can the protection intended in its enactment, to landlord and tenant alike, be given full effect. It follows that the tenancy of Berner was uninterrupted by the sale to Koenig, trustee. See *Huntington v. Parkhurst, supra*.

III. It will be observed that the term of the written lease ended February 20, 1894, and the chattel mortgage was not executed until April 24, 1896. We have held that the lien for rent attaches for that to accrue in the future under the contract. *Brody v. Cohen*, 106 Iowa, 309. But how long in the future does a tenancy at will, implied under the statute, extend? Is it for an uncertain time, to be fixed

at the pleasure of one or both of the parties thereafter? If so, then the extent of the landlord's lien on the property used by the tenant on the premises cannot be estimated, or even conjectured, as the term may run on indefinitely.

3 We think it reaches ahead no further than is required to terminate it by one of the parties. Neither is bound for a longer period. Such a holding is just to the landlord, and also to creditors. The former may protect himself by ending the tenancy on thirty days' notice, and if he does not care to do so, his lien for rent to accrue after the lapse of that time from the attaching of other liens will be subject to them; that is, the duration of a tenancy at will at any moment is the period within which it may be terminated on notice. This was the conclusion reached in *Thorpe v. Fowler*, 57 Iowa, 541, where the defendant in May, 1878, went into possession of a building under an oral lease for one year, with the privilege of five, and occupied it till October, 1880. The intervener's mortgage was executed in February, 1880, and the action was for the rent accruing during the five and one-half months previous to October of that year. The lease for one year was valid, only the right to have it extended being void under the statute of frauds. Fowler then at the end of one year became a tenant at will (possibly at the end of two, as suggested in the opinion), under the condition of the oral lease for the payment of rent. The mortgage was adjudged to be the superior lien, because of there being no contract at the date of its execution. Reference was had to an express contract, though possibly the writer of the opinion had in mind the thought, sometimes found in the books, that the obligation of a tenant holding over springs from a duty the law imposes, rather than a contract implied. We regard the case as decisive of the one at bar, and discover no sufficient reason for not following it. —REVERSED.

MICHAEL ROTTER, IDA ROTTER, v. SARAH J. SCOTT and SARAH J. SCOTT, Administratrix, etc., Appellants, JOHN M. SCOTT, Defendant. Consolidated with SARAH J. SCOTT, Appellant, v. IDA ROTTER, MICHAEL ROTTER and JOHN SCOTT.

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Trusts: EVIDENCE: *Husband and wife.* When land was bought, husband was able to pay for it. The wife had some money then but it appears that she loaned some after the land was bought. It is found that she contributed to the purchase to some extent. Title was taken in the name of the husband and so remained for over thirty years. The wife was appointed his guardian upon allegation that he had undertaken to rent his land and that there was danger of squandering his estate, real and personal. As his administratrix she gave the names of his heirs but did not assert any ownership in the land or assert the claim of advanced purchase price. *Held*, that this was not overcome by evidence of alleged declarations of the husband such as, "He told me plainly she put her money that she had in the place there. He said for safe keeping." "About the time they bought he told me 'I and Jane can buy that farm,' specifying her money with his." "He and Mrs. Scott had enough to buy the farm and it was better to buy it than to put the money on interest." And "He said if she put her money in they could buy the place. They had bought and she had paid all her money in."

EXPECTATION OF REPAYMENT. Where money contributed by a wife towards the purchase of land conveyed to her husband was given to him to be used and controlled by him as his own, and without expectation of repayment, or having a special interest in the land on account thereof, no trust therein resulted in her favor.

Appeal from Lee District Court.—HON. H. BANK, Jr., Judge.

THURSDAY, APRIL 12, 1900.

JOHN SCOTT died intestate, holding the record title to certain real estate, leaving Sarah J. Scott, his widow, Ida Rotter, his daughter, wife of Michael Rotter, and John M.

Scott, his son, his only heirs, surviving him. The first-entitled action is for the partition of said land, and therein Sarah J. Scott claims for herself that she is entitled to a one-third interest in said land, in addition to her rights as widow, by reason of having contributed one-third of the purchase price of the land under an understanding with her husband. As administratrix of the estate of John Scott, she claims that there are unpaid debts against the estate, and that partition should not be granted until these are paid. The second-entitled action is by Sarah J. Scott to establish her said claim in the land in addition to her rights as widow. Issues were joined in both cases as to said claim of Mrs. Scott in addition to her rights as widow. The cases were consolidated, and, upon hearing had, said claim of Mrs. Scott was dismissed, and decree rendered for partition of the land, and providing for the payment of debts. From this decree Sarah J. Scott for herself and as administratrix appeals.—*Affirmed.*

Stutsman & Stutsman for appellant.

Miller & Beck and *J. W. Rhodes* for appellee.

GIVEN, J.—The land in controversy was purchased by John Scott in 1864, the title taken in his name, and he and his wife resided thereon from that time until his death, in 1896. The claim of Mrs. Sarah J. Scott is that at the time of their marriage, in 1864, she had a sum of money derived from her father's estate, and that at the time this land was purchased she gave that money towards paying the purchase price to the amount of one-third thereof, to-wit, twelve hundred dollars in cash, and a cow at forty dollars. She claims that she did so with the understanding that she should have and hold an interest in said land as her own in proportion to the amount advanced by her, that she does not know why the title was taken in the name of her husband, but says that the land was to be held in trust for her to the extent

of her interest therein. We first inquire whether Mrs. Scott contributed to the purchase of the land. That she had at the time of her marriage, and at the time the land was purchased, several hundred dollars in money, derived from her father's estate, is quite satisfactorily shown, but there is considerable conflict in the evidence as to whether all or any of it went into the purchase of the land. It

1 appears that Mr. Scott was then a man of considerable means, and able to pay for the land himself. There is also evidence tending to show that Mrs. Scott loaned money some time after the land was purchased, which must have been derived from her father's estate. We are inclined to the conclusion, however, that Mrs. Scott did contribute some money towards the purchase of the land, but, in the view we take of the case, it is not necessary that we determine just what that amount was. We next inquire whether the amount contributed by her was upon the understanding alleged, namely, that "she should have and hold an interest in said real estate as her own in proportion to the amount she advanced." The land was purchased soon after their marriage, when Mr. Scott was prosperous, and well situated financially, and when his wife, no doubt, had confidence in his ability to manage his affairs successfully. The title was taken in Mr. Scott's name, and so stood of record unquestioned until the commencement of these suits. Mrs. Scott put whatever money she did into the land without making any written evidence of the understanding upon which she claims it was put in, and her claim as to this understanding has no support except in vague and unsatisfactory evidence of occasional and casual statements by Mr. Scott. One witness says: "He told me plainly she put her money that she had into the place there. He said for safe-keeping." William May, brother of plaintiff, says: "About the time they bought it, Scott told me, 'I and Jane can buy that farm,' specifying her money in with his." Mrs. William May testifies that

Mr. Scott said he and Mrs. Scott had enough money to buy the farm, and that it was better to buy it than to put the money on interest. Eliza May, sister of appellant, testifies: "He said, if she put her money in, they could buy the place. They had bought, and she had paid all her money in." As against this and some similar evidence, we have the further fact that in 1894, John Scott having become feeble-minded, appellant was appointed his guardian. In her petition for appointment she gave as a reason that Mr. Scott had undertaken to rent his land to three different persons, "and that unless a guardian be appointed, he will squander his estate, real and personal." She did not make claim of interest in the land in that proceeding, nor did she in leasing the land as guardian. In her report as administratrix she gave the name of the heirs and description of the land, but did not

assert this disputed claim. Without referring further to the evidence, we will say that it fails to establish the alleged understanding, and leads us to the conclusion that whatever amount Mrs. Scott contributed of her money or property to the purchase of the land was given to her husband to be used and controlled by him as his own, and without expectation of repayment, or of having a special interest in the land on account thereof. That being true, no trust resulted in her favor. This conclusion renders it unnecessary that we notice the defenses of estoppel and of the statute of limitations. As already said, the decree makes proper provision for the payment of unpaid debts of the estate. As we view it, the decree is correct, and it is
2 AFFIRMED.

STATE OF IOWA v. E. A. PINCKNEY, Appellant. .

Liquor Nuisance: INDICTMENT. An indictment for keeping a nuisance alleged that defendant used a certain building as a drug store. "with the intent to sell there intoxicating liquors, to-wit (describing them), and then and there did sell the same." *Held.*

that the words "then and there," following the description of the liquors, are sufficient to designate the drug store as the place of the unlawful sale.

Appeal from Winnebago District Court.—HON. C. H. KELLY, Judge.

THURSDAY, APRIL 12, 1900.

THE defendant was indicted for keeping a nuisance. His demurrer to the indictment was overruled, and he appeals.—*Affirmed.*

L. S. Butler and Geo. D. Peters for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

SHERWIN, J.—The indictment is in the following language: "The grand jury of the county of Winnebago, in the name and by the authority of the state of Iowa, accuse E. A. Pinckney of the crime of maintaining a nuisance, committed as follows: That the said E. A. Pinckney on or about the 5th day of November, in the year of our Lord 1898, in the county aforesaid, and on divers other days and times between the said 5th day of November, 1898, and the finding of this indictment, did keep, use, and occupy a certain building in the town of Forest City, county and state aforesaid, commonly known as a 'drug store,' with the intent to sell there, contrary to law, intoxicating liquors, to-wit, beer, whisky, rum, gin, brandy, and other intoxicating liquors, the names of which are to this grand jury unknown, and then and there did sell the same contrary to and in violation of the law." The defendant demurred to this indictment on the ground that it does not substantially conform to the statute, and does not charge that the defendant sold intoxicating liquors in the building named therein. The real contention is that the words "then and there," used at the

conclusion of the indictment, are not sufficiently direct and certain as to the place where the liquors were sold to constitute an averment that they were sold in the building or drug store mentioned in the indictment. It must be conceded that the indictment in this respect is not as clear and explicit as it might easily have been made, and, to sustain it, we must look to the intention of the pleader, rather than to the precise language itself. The only case to which our attention has been called which seems, upon examination, to support the indictment before us, is that of *State v. Freeman*, 27 Iowa, 333; and it is not entirely clear that the precise question now before us was considered in that case, although an indictment similar to the one at bar was held good, generally. In *State v. Harris*, 27 Iowa, 430, cited by the appellee in support of its position, the question as to the sufficiency of the indictment was not before the court; and *State v. Allen*, 32 Iowa, 248, was decided upon another point entirely. It will be observed that the charge here is that the defendant "did keep, use, and occupy a certain building in * * * Forest City, county and state aforesaid, commonly known as a 'drug store,' with the intent to sell there intoxicating liquors, to-wit, * * * and then and there did sell the same." The appellant concedes that the indictment, down to the word "liquors," charges an intent to sell in the building, and we think this a fair construction of the language used. But down to this point no crime was charged in the indictment, and unless the words "then and there," following the description of the liquors, can be said to direct the common understanding to the building as the place where the unlawful sale was made, the indictment was insufficient. The indictment itself shows an attempt to charge the keeping of a nuisance. The place used and kept is described as a drug store situated within a political subdivision of the county where the venue is laid. The words "then and there," given their fullest meaning may, we think, be said to designate and point out the building located as particularly described.

Text writers upon criminal law lay down the rule "that indictments are not required to be so strictly nice and technical for misdemeanor as for felony." Bishop Criminal Procedure, section 413. And our own statute says they are sufficient if drawn "in such manner as to enable a person of common understanding to know what is intended." Code, section 5280. We conclude, with some hesitation, however, that the indictment is sufficient, and the judgment is therefore AFFIRMED.

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f133	631

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f140	690

STATE OF IOWA V. R. R. SWALLUM, Appellant.

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f144	684

Request for Liquor: DESCRIPTION OF RESIDENCE. Under Code, section 2394, providing that, before selling intoxicating liquors to any person, a request must be signed by the applicant stating for whom and for whose use the liquor is required, his residence, and, 2 where numbered, by street and number, if in a city, etc., an applicant for the purchase of liquors for his own use must state in his request his residence, by street and number, if he lives in a city where the residences are numbered.

Specification of Use Intended. Code, section 2385, provides for the sale of alcohol for "specified" chemical and mechanical purposes. Section 2394 provides that the request of the applicant for the purchase of intoxicating liquors must state, "the actual 4 purpose for which the request is made and for what use desired." *Held*, that the purchaser of alcohol must specify in his request the exact purpose and use for which it is required.

Oversight and mistake no defense. The requirements of law providing for the sale of liquor for certain purposes and in a 3 certain manner, and naming the things that the seller must do before making such sale, may not be avoided by him by proving oversight, forgetfulness or mistake.

Instructions: EVIDENCE: A witness said he "had bought prescriptions for others, but did not know how they read or whether they called for intoxicating liquors or not." There was no 1 evidence that the prescriptions sold this witness contained intoxicating liquor. *Held*, it was error to submit the question whether defendant sold intoxicating liquors upon a physician's prescription without taking a written request therefor.

Appeal from Hardin District Court.—HON. S. M. WEAVER,
Judge.

THURSDAY, APRIL 12, 1900.

THE defendant was tried on an indictment for nuisance, in the sale of intoxicating liquors. He was convicted, and appeals.—*Reversed.*

H. L. Huff and Nagle & Nagle for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

SHERWIN, J.—The instructions of the court submitted to the jury the question of whether the defendant sold intoxicating liquor upon a physician's prescription, without taking a written request therefor. The only evidence before the court, touching that question, was that of a witness who testified "that he bought prescriptions for others, but did not know how they read, or whether they called for
1 intoxicating liquors or not." There was no evidence that the prescriptions sold by defendant to this witness contained intoxicating liquors. The instruction complained of submitted to the jury a material question of fact upon which there was no evidence, and was prejudicial error. *State v. Archer*, 69 Iowa, 420; *White v. Spangler*, 68 Iowa, 222; *Negley v. Cowell*, 91 Iowa, 256.

II. The jury was instructed, in substance, that an applicant for the purchase of intoxicating liquor for his own use must state in his request therefor his residence, by
2 street and number, if he live in a city where the residences are numbered. We think this the proper construction of the statute. If the applicant makes the purchase for another, he must give the street and number of the user, and in such case is only required to state his own residence generally; but, if he is to use the liquor him-

self, he must describe his residence with the same particularity required when he purchases for another. In other words, we think the statute requires the specific location of the user of liquor, if he live in a numbered city. If he does not live in such city, but lives in a town or village, he should give the name of the town or village in which he resides.

3 If in the country, the township and county are sufficient. The contention of the defendant that he may avoid these requirements of the law by proving oversight, forgetfulness, or mistake cannot be sustained. The law provides for the sale of liquor for certain purposes, and points out the manner of sale, and names the things that the seller must do before making it. The sale of liquor is a special privilege granted to him, to be exercised only in strict compliance with the requirements of the statute, and it is his duty to know that he brings himself within the law. To hold otherwise would be to open wide the door for the evasion of this statute, and give it a meaning at variance with its intent and purpose. *State v. Thompson*, 74 Iowa, 122, is directly in point in principle. What we have already said disposes of the objections to the ninth instruction. We

4 cannot agree with the position of counsel for defendant as to the tenth instruction. Section 2835 of the Code provides for the sale of alcohol for specified chemical and mechanical purposes. The request for liquor must state "the actual purpose for which the request is made and for what use desired." If for medicinal use, it must so state. If for chemical or mechanical purposes, the exact purpose and use for which required must be specified by the purchaser. No other construction can be given the statute, unless we eliminate therefrom the word "specified," which was placed therein for the evident purpose of guarding against deception and fraud in the sale of liquor. Nor does this holding broaden or add to section 2394, which provides, as we have seen, that "the actual purpose" and "the use for which required" must be stated. This instruction correctly

states the law, and is supported by evidence. We find no error in the exclusion of testimony. Because of the error pointed out herein, the case is reversed and remanded.—**REVERSED.**

SOL STUTSMAN, Appellant, v. JOHN McVICAR, Mayor of the
City of Des Moines, THE CITY OF DES MOINES,
Intervener.

111 40
f111 112

Resolution Allowing Claim: EFFECT OF VETO UPON WARRANT DRAWN UPON ALLOWANCE: *Mayor's refusal to attest same.* Plaintiff presented a claim for damages for personal injuries to the city of D, the allowance of which was recommended by the damage committee of the city council. The council adopted the report, which the mayor vetoed. *Held* that, since the adoption of the committee's report was a resolution requiring the mayor's assent, or passage over his veto, as provided by Code, section 685, the mayor properly refused to sign a warrant for the amount of the claim drawn on the city treasury, as required by Revised Ordinances City of Des Moines, section 36, no further action having been taken by the council after the mayor's veto.

Appeal from Polk District Court.—HON. THOMAS F. STEVENSON, Judge.

FRIDAY, APRIL 13, 1900.

ACTION for a peremptory writ of mandamus commanding the defendant, McVicar, as mayor of said city, to attest the signature of the city auditor to a warrant issued by said auditor on the said city treasurer in favor of the plaintiff. The defendant, McVicar, answered, and the city of Des Moines intervened. The issues will appear in the opinion. The question presented on this appeal was raised by demurrers to the answer and the petition of intervention, both of which were overruled, and, the plaintiff electing to stand on said demurrers, his petition was dismissed, from which he appeals.—*Affirmed.*

Brennan & Brennan for appellant.

L. Ward Bannister for appellees.

GIVEN, J.—I. The facts are undisputed, and are as follows: The plaintiff made claim against the city for damages incurred by personal injuries. On October 18, 1897, the damage committee of the city council and the city solicitor reported to the council recommending that two hundred dollars be allowed in full of said claim, whereupon the following proceedings were had by the council: "On motion of Alderman Wilkins the above report of the damage committee and assistant solicitor was adopted, and the auditor instructed to draw a warrant for the amount by yeas, 8, nays, none; Loper not present." The city clerk certified this action to the city auditor, and on October 19, 1897, he drew a warrant on the city treasury in favor of the plaintiff for the amount allowed, in form as required by law. This warrant was presented to the defendant, McVicar, mayor, to be attested by his signature, which he refused, and this action is to compel him to so attest said warrant. On November 1, 1897, the mayor returned said resolution allowing plaintiff's claim to the council "without approval," with his reason therefor, and no further action was taken on the resolution or claim by the city council.

II. Section 36 of the Revised Ordinances of 1889, of the city is as follows: "It shall be the duty of the auditor to draw all warrants on the city treasury as ordered by the city council. All warrants shall show both in the stub and warrant upon what fund, and what particular appropriation drawn, and shall not embrace more than one fund or department; and it shall be the duty of the mayor to attest said warrants by his signature and seal of the city." Section 685 of the Code is as follows: "Sec. 685. Signing by Mayor—Veto—Passing Over Veto. The mayor shall sign every ordinance or resolution passed by the council before

the same shall be in force, and, if he refuses to sign any such ordinance or resolution, he shall call a meeting of the council within fourteen days thereafter, and return the same, with his reasons therefor. If he fails to call the meeting within the time fixed above, or fails to return the ordinance or resolution, with his reasons, as herein required, such ordinance or resolution shall become operative without such signature, and the clerk shall record it in the ordinance book, with a minute of the facts making it operative. Upon the return of any such ordinance or resolution by the mayor to the council, it may pass the same over his objections, upon a call of the yeas and nays, but not less than a two-thirds vote of the council, and the clerk shall certify on said ordinance or resolution that the same was passed by a two-thirds vote of the council, and sign it officially as clerk." See *Heins v. Lincoln*, 102 Iowa, 69. The action of the city council in allowing the plaintiff's claim, though not expressed in the usual form of a resolution, was, nevertheless, a resolve of that body, and required the signature of the mayor. The mayor did not sign it, but returned it without approval, with his reasons, within the time allowed; and, therefore, without further action by the council, the resolution was not in force, and did not authorize the issuing of the warrant. The city clerk should not have certified this claim as allowed until the resolution was in force by being signed by the mayor, by being passed over his veto, or by being withheld without veto or signature for more than fourteen days. This resolution was never in force, therefore was not authority to the city auditor to draw the warrant in question, and the mayor was justified in refusing to attest the warrant. Plaintiff's petition was properly dismissed.—AFFIRMED.

ALICE JORDAN, Guardian of Gracie Jordan, a minor, v.
 ARTHUR HINKLE, HENRY HINKLE, LORA CRAPFEL, A.
 F. CRAPFEL AND MARY HINKLE, Appellants, v. GRACIE
 JORDAN, KEO JORDAN AND J. O. HUNNELL, Executor,
 Defendants.

111	48
116	705
111	43
6121	71
111	43
128	646
111	43
133	89

Wills: "DYING WITHOUT HEIRS" CONSTRUED. A testator devised certain lands to two granddaughters in severalty, subject to the condition that if they "should die without heirs" the lands devised should "revert back" to such of his heirs as might be living at that time. The will also provided that the several devises therein made should take effect after the testator's death. *Held* that, as the estates could not revert until vested, and could not vest till the testator's death, the "dying without heirs" contemplated was after and not before, the testator's death, and, hence, the granddaughters took at the testator's death conditional estates only, subject to being determined by their dying without heirs; and that title to the lands would not be quieted in the granddaughters against the other heirs. Stress is laid, too, upon the fact that the testator's age and feeble health made it unlikely that he should have contemplated that any of his grandchildren would die before him.

Appeal from Davis District Court.—HON. T. M. FEE,
 Judge.

FRIDAY, APRIL 13, 1900.

THE plaintiff, as guardian, asks that the title to certain real estate be quieted in her ward, Gracie Jordan, as against defendants (appellants), and for an order to sell said real estate. The question involved is as to the proper construction to be given to the last will and testament of James H. Jordan, deceased. On hearing had, said will was construed as claimed by the plaintiff, and decree rendered accordingly, from which the defendants appeal.—*Reversed*.

McNett & Tisdale for appellants.

E. E. McElroy for appellee.

GIVEN, J.—I. The will of Mr. Jordan, after directing in the first paragraph, the payment of debts and funeral expenses out of the personal property, provides, in the second, that the proceeds of the personal property remaining shall be divided equally among his grandchildren, naming them, being the plaintiff's ward and the defendants (appellants) above named. The third paragraph devised "to the heirs at law of my daughter Sallie Hinkle, to share and share alike, the following described real estate," describing certain lands. The fourth paragraph devised "to Keo Jordan, daughter of my deceased son Victor P. Jordan, the following real estate," describing certain lands. The fifth devises "to Gracie Jordan, daughter of my deceased son H. C. Jordan, the following described real estate," describing certain other lands. The sixth paragraph, the construction of which is the subject of this controversy, is as follows: "Sixth. It is my express will that in case either of my said granddaughters, Gracie Jordan or Keo Jordan, should die without heirs, then, and in that event, the real estate herein bequeathed to them, or either of them, as the case may be, shall revert back to such of my legal heirs as may be living at that time, in equal proportion." The contention is as to the construction to be given to the words "should die without heirs," as found in said sixth paragraph. There is no dispute but that the word "heirs" means heirs of the body. See *Furenes v. Severtson*, 102 Iowa, 323. The plaintiff contends that the words "should die without heirs" must be construed as meaning that, if Gracie or Keo should die without heirs before the testator's death, then the estate would have reverted back; while the defendants (appellants) claim that the estate devised to either is to revert back on the death of the devisee without heirs, whether

her death was before or after that of the testator. The learned district judge construed the will as claimed by the plaintiff, and held that, as Gracie survived the testator, her estate has become an absolute estate in fee simple. If the will is to be construed as claimed by the defendants (appellants), Gracie and Keo have but a conditional estate, and the land of each is subject to revert back on her death without heirs of her body.

II. Counsel quote at length from text-books and cases, and present numerous citations, yet, as we said in *Wilhelm v. Calder*, 102 Iowa, 342, "cases are of little help, except as they settle rules and principles by which to arrive at the intent of the testator, which is always the pivotal point of inquiry in such controversies as this." A primary rule of construction is that the intention of the testator, when ascertained, and not contrary to law, must control. *Jordan v. Woodin*, 93 Iowa, 453; *Meek v. Briggs*, 87 Iowa, 610. That intention must be arrived at from the will alone, unless it be ambiguous and uncertain as to the estate or thing bequeathed or devised, or as to the person for whom the bequest or devise is intended. When thus ambiguous, extrinsic evidence will be considered, not to vary the plain effect of the language used, but for the purpose of making intelligible in the will that which without its aid cannot be understood. *Moran v. Moran*, 104 Iowa, 216 (39 L. R. A. 204); *Evans v. Hunter*, 86 Iowa, 413 (17 L. R. A. 308); *Furenes v. Severtson*, 102 Iowa, 322. "Where the language is plain and unequivocal, there is no room for construction." *Smith v. Runnels*, 97 Iowa, 55. Looking to the will, we see that in the fourth and fifth paragraphs devises are made to Keo and Gracie, respectively, which, if nothing further appeared, vested them at the death of the testator with absolute title in the lands devised. In the sixth paragraph a condition is made as to their title, namely, that, in case either "should die without heirs,"—that is, heirs of her body,—the real estate devised "shall revert back." By the

eighth paragraph of the will it is provided "that the real estate hereinbefore described shall go to my heirs in the manner and in the proportions I have specified herein, after my death." This shows clearly an intention that the devisees should not vest in the devisees until the testator's death. The condition of Keo's and Gracie's title is that, in case of death without issue, the real estate shall revert back. It could not "revert back" until it had become vested; it could not become vested during the life of the testator; therefore, the death without heirs could not have been intended to mean death before the decease of the testator. Assume that Gracie had died without issue before the death of the testator, the land devised to her would never have become vested in her. It would have gone to the heirs of the testator, not by reversion, but by inheritance, as if no will had been made. Had Gracie died, leaving issue, before the testator's death, the land would have vested in the issue on the death of the testator, and there would be no reversion. In other words, a reversion could not follow from the death of Keo or Gracie before that of the testator, whether with or without heirs. The provision that the land "shall revert back" seems to us to entirely preclude the conclusion that the testator intended that the land should only go to his heirs in case Keo or Gracie died without heirs, before his death. We think the intention is clear that the land is to go to the testator's heirs living at the time of the death of Keo or Gracie without heirs, whenever that occurred.

III. If it should be said that there is such ambiguity in the will as to the estate intended to be devised that we should consider the extrinsic facts, these, we think confirm the view we have expressed as to the intention of the testator. It appears from the agreed statement of facts as follows: The will under consideration was executed January 11, 1891, at a time when the testator was in feeble health, owing to his advanced age, and in anticipation of an early death, though he survived

until July, 1893. He left surviving him as his only next of kin his said six grandchildren and a sister residing in Kentucky. He died seised of the lands described in the will, and had owned and resided thereon for many years. His grandchildren were reared in the same neighborhood, and were well known to him. At the time the will was executed the youngest of the four Hinkle children was about thirteen yet the condition is the same as to both. These facts go far. It seems to us that the testator, at his advanced age and feeble condition, could not have contemplated that he might live until Keo or Gracie might have heirs born to them,—surely not as to Gracie, who was then only five years old,—yet the condition is the same as to both. These facts go far to convince us that the words “should die without heirs,” in the sixth paragraph, were not intended to mean should die without heirs during the life of the testator. It is urged in argument that the lands described in the devises to Keo and to Gracie are largely more valuable than those devised to the Hinkle grandchildren, and hence it was that the testator imposed the condition expressed in the sixth paragraph on their title. The intention of the testator being clear as to the estate devised, we may not inquire into the equality or justice of his devises. Our conclusion is that under this will plaintiff's ward, Gracie Jordan, and the defendant Keo Jordan took, at the death of the testator, a conditional fee title in the lands devised to them, respectively, subject to be determined upon her dying without heirs of her body.—
REVERSED.

DUBUQUE LUMBER COMPANY v. N. W. KIMBALL, C. H. EIGHMEY, Executors of the Estate of C. W. ROBINSON, Deceased, Appellants.

111	48
112	694

111	48
119	35

111	48
d143	724

Lessee Holding Over: RENT. After the expiration of the lease under which the lessee agreed to pay \$5 per day, he held over for thirty days, and then took a new lease at the rate of \$2.50 per 4 day. *Held*, that for the period between the two leases, the lessee was liable for the rent fixed in the former.

Interested Witness: STOCKHOLDER AFTER TRANSFER. Where a witness has been an officer and stockholder in plaintiff company, but had resigned and transferred all his interest before the trial 5 and the company is insolvent, he is not a party interested in the event, so as to disqualify him, under Code, section 4604.

Construction of Lease: JURY QUESTION. Defendant leased for five years from plaintiff a sawmill property, including all personal property "now in use in the mill and on the premises," and also all horses and wagons, harness, carts, etc., "now used by" plaintiff. No provision was made for its disposition at the 1 termination of the lease, but at the end of the term a settlement was endorsed on the lease. Three days after the lease was executed an additional contract was entered into between the parties, specifying certain horses, wagons, and harness furnished by plaintiff to defendant, and providing that "similar property in value to be returned at the end of this lease." *Held*, that whether the property specified in the contract was that included in the lease, so as to be included in the settlement, was for the jury.

SAME. Where property was furnished by plaintiff to defendant under a contract providing that "similar property in value to be returned at the end of this lease at the joint expense of these parties," an instruction that plaintiff should be allowed 2 one-half of the value of the property, as fixed at the time of the contract, "after deducting therefrom two horses and three cows," is error, since it is the *value* of the horses and cows at the time of their return which is to be deducted.

INTEREST. On the expiration of a lease in August, 1891, a settlement was made providing that the lessee should leave on the premises property equal in value to that which was there when he entered there. By subsequent leases the term was extended

3 to January, 1892. *Held*, that interest on the difference in value of the property left should be computed only from 1892.

Same. Where plaintiff's claim is based on two items falling due at different times, and on interest thereon computed up to the time of filing suit, he should not be allowed interest on the 5 entire amount, but only on the two items from the dates when they fell due.

Amendments: DISCRETION. To refuse to permit plaintiff to amend his petition to enlarge the amounts of his claim against an 7 estate, after the lapse of three years, and just before the case is submitted to the jury, is not an abuse of discretion.

Review on Appeal: ISSUE NOT PLEADED. Where the question as to plaintiff's right to prosecute the action was not raised in the 7 pleadings, it will not be considered on appeal.

SAME: Motion in arrest, Where the question as to the sufficiency of the petition was not raised by motion in arrest of judgment, 7 it will not be considered on appeal.

Appeal from Dubuque District Court.—HON. J. L. HUSTED,
Judge.

FRIDAY, APRIL 13, 1900.

ACTION on a claim against defendants, as executors of C. W. Robison, deceased, who pleaded the amount paid on a note of plaintiff and another, as guarantors, as a counter-claim. There was a verdict and judgment for the plaintiff. Both parties appeal, that of defendants being first perfected. —*Reversed.*

D. E. Lyon and Geo. T. Lyon for appellants.

R. W. Stewart for appellee.

LADD, J.—The plaintiff, on the twenty-second day of January, 1886, entered into an agreement "to lease to C. W. Robison their sawmill property, which includes all their real estate and personal property, now in use in the mill and on the premises, which includes all structures now on the premises, and machines and tools now in use in and around

said structures, and also all horses and wagons, harness, carts," etc., "now used by the Dubuque Lumber Co.," beginning January 25, 1886, and to continue five years. Robison agreed to make certain investments, and all personal property furnished by him, if in existence, was to be returned to him. The rental stipulated was an equal division of profits, payable after making a complete inventory, January 1st of each year. On the last named date there was another contract in these words:

"The Dubuque Lumber Co. furnishes C. W. Robison:

4 horses valued at.....	\$850 00
3 good wagons valued at.....	150 00
5 old " " ".....	100 00
3 four-wheeled carts at	100 00
3 two-wheeled carts at.....	50 00
2 sleds at.....	25 00
2 sets harness and cart harness.....	50 00
	<hr/>
	\$825 00

—The same to be used in the business for the joint benefit of D. L. Co. and C. W. R., and similar property in value to be returned at the end of this lease, at the joint expense of the parties, in five years from this date."

The plaintiff alleged that none of the property set out in the contract of January 25, 1886, save two horses, worth seventy-five dollars; three wagons, worth sixty dollars; and two sleds, worth twenty-five dollars, had been returned by Robison at the expiration of the lease, and asked that its claim for one-half of the balance, with interest, be allowed. The executors insisted that this property was the same as that included in the lease, and that the contract of January 25, 1886, was merely supplemental thereto.

If included in the lease, it was fully settled by an indorsement thereon August 5, 1891, in words: "This contract is this day and hereby settled and discharged, so far as all its provisions are concerned," followed by a stipulation for the division of property, and that "all wagons, carts,

trucks, horses, and other personal property furnished by the Dubuque Lumber Co. at the commencement of the lease of January, 1886, shall be returned to the Dubuque Lumber Co., if in existence, and the same, if furnished by Robison, shall be returned to him, as provided for in the lease." It will be observed that the lease covered all property "now used by the Dubuque Lumber Co.," but made no provision with respect to its disposition at the termination of that instrument, and that the contract required "similar property in value to be returned at the end of this lease, at the joint expense of the parties." There was evidence tending

1 to show that the horses and articles were used by the plaintiff at the time the lease was executed, and for this reason the court erred in not submitting to the jury the question as to whether the chattels described in the contract were those referred to in the lease. If they were, the

2 settlement of August 5, 1891, was final. There was also manifest error in directing the jury to allow "one half of the value fixed in the contract of January 25, 1886, herein referred to, as the second item of said lumber company's claim, after first deducting therefrom two horses and three cows." Of course, value, and not property, was to be deducted, and the jury should have been advised to fix that at the time the property was returned. Again, the petition admitted the return of two sleds, valued at twenty-five dollars, and this should have been deducted. Possibly these errors would have been obviated had the condition that similar property in value was to be returned at the end of five years and the admissions been called to the jury's attention in the statement of the issues or elsewhere in the instructions, but that was not done. Notwithstanding the executor's statement that "all said articles, excepting 2 or 3 horses and a part of 2 old wagons, were used up, and became worthless," the plaintiff ought not to be allowed more than it claimed. The evidence showed other of the articles and their value, left on the premises, but as to these no issue was presented.

II. In the settlement of August 5, 1891, it was agreed "that wood and sawdust of the last year's sawing, equal in value to that received by Robison of the Dubuque Lumber Co., January 25, 1886, shall be left on the premises." Under subsequent leases he held this property until January 1, 1892, though the mill closed in October or November of that year. Interest on the difference in the value of
3 the wood received and that left should have been computed from January 1, 1892, and not January 25, 1891, as directed.

III. On March 16, 1891, in a lease of the planing mill, Robison agreed to pay, as rent, "five dollars per day for each working day that the mill is actually in operation," from January 25th to July 25th of that year. After its expiration he held over till August 20, 1891, and from then on, under another agreement, till January 1, 1892, "at the rate of two and 50-100 dollars per day for every full day during said time that the mill is in actual operation." The settlement of August 5, 1891, did not purport to include
4 any rent due under these circumstances. The lessee holding over, however, occupied the premises under the terms of the last lease, in so far as applicable, and the plaintiff was entitled to recover the rental stipulated in the lease of March 16, 1891, from its expiration to August 20th of that year, rather than the reasonable value of the use of the premises, as the court instructed. *Bank v. Herron*, 111 Iowa, 25. The amended petition is based on the claim for rent filed in the sum of three hundred and thirty-five dollars and forty-two cents up to January 25, 1891, and subsequently two hundred and thirty-two dollars and twenty-five cents, less an item of thirteen dollars and seventy cents, leaving two hundred and eighteen dollars and ninety-five cents from; then till January 1, 1892. Interest was included in
5 making the total of six hundred and fifty-two dollars and sixty-two cents. The tenth instruction permitted recovery for this entire amount, with interest from

January 1, 1892. The jury should have been directed to have allowed whatever was owing on the lease for rent on the lease of March 16, 1891, not exceeding three hundred and thirty-two dollars and forty-two cents, with interest added from July 25, 1891, and, whatever was owing for rent from that time to January 1, 1892, not exceeding two hundred and eighteen dollars and ninety-five cents, with interest added from the latter date.

IV. The evidence established Moore's competency to testify. While he had been an officer of and a stockholder in the Dubuque Lumber Company for many years, it appeared that he had transferred all interest therein and resigned as such officer before the trial, and, besides, that the company had long been insolvent and its stock worthless. We have held the interest which will prevent a person from testifying, under section 4604 of the Code, "means such an interest in the event as would at common law disqualify a witness." *Goddard v. Leffingwell*, 40 Iowa, 249;

6 *Zerbe v. Reigart*, 42 Iowa, 232. Where the interest is collateral merely, the competency of a witness may be restored by the release or transfer of it at any time before testifying, though this be done for that express purpose. *Heft v. Ogle*, 127 Pa. Sup., 244 (18 Atl. Rep. 19); *Insurance Co. v. Crane*, 16 Md. 260 (77 Am. Dec. 293); *Insurance Co. v. Caldwell*, 3 Wend. 301; *Stall v. Bank*, 18 Wend. 466; *Railroad Co. v. Irick*, 23 N. J. Law, 320. The rule is thus stated by Black, J., in *Com. v. Ohio & P. R. Co.*, 1 Grant, Cas. 329 (see *Heft v. Ogle*, *supra*): "When the interest of the witness is collateral, his competency may be restored by a release or transfer of it. The rule in *Post v. Avery*, 5 W. & S. 509, applies only to persons who have assigned choses in action on which the recovery would have been for their own use, if no assignments had been made. Its object is to prevent a party from transferring himself into a witness by the magic of a bit of paper. It forbids one who assigns a claim to sell his oath along with

it. But a person who has a merely incidental interest in the result—an interest which arises entirely out of the fact that the record may be evidence for or against him in some other action—may divest himself of such interest, and, if he does so at any time before he is offered as a witness, his testimony must be received. For instance, a stockholder in a corporation may transfer his stock and become a witness for the company.” *Darragh v. Biggen*, 183 Pa. Sup. 397 (39 Atl. Rep. 37), was determined under the provisions of a statute of that state, and is not in point.

V. Regardless of whether an amendment may be filed, after the statutory period for presenting claims, the refusal to permit plaintiff to so amend its petition as to enlarge the amount sought to be recovered on each item, after the lapse of three years, and just before the case was submitted to the jury, involved no abuse of discretion. No issue as to plaintiff’s right to prosecute the action was made in the pleadings, nor was the sufficiency of the petition raised by motion in arrest of judgment. For this reason we shall not consider the question at this time. Other errors assigned require no attention.—REVERSED.

F. A. ADAMS, Appellant, v. WALTER S. HOLDEN *et al.*,
Appellees.

Redemption: LIMITATION OF ACTIONS: *Deed as mortgage.* Where deeds are given, absolute on their face, but accompanied by contracts of defeasance, to be operative if grantor makes payment within a time specified, and the grantee enters into possession thereunder, a suit subsequently instituted by the grantor to recover the lands is in effect, but an action to redeem—such deeds amounting only to mortgages; and, an action to foreclose being barred in ten years, such suit will also be barred in ten years from the time the debt secured by the deeds is due. Ten years from that time the grantee’s right of action on the debt and to foreclose grantor’s equity of redemption is barred and, reciprocally, the right to redeem is cut off at the same time.

111	54
118	508
111	54
118	583
111	54
133	371
111	54
144	226

TRUSTS: Limitation of actions. While one who goes into possession under a deed which is in fact a mortgage, is, in a sense, a trustee, the statute of limitations applies to such a trust although there has been no act indicating an intent to disavow it.

SAME: Disavowal of trust. Where the grantee under deeds operating as mortgages conveys the land to a third person, such act is a disavowal of any trust resulting in grantor's favor after payment of the debt secured, and starts the statute of limitations running in the grantee's behalf against the grantor's suit for an accounting and to recover the lands.

Limitation of Actions: PARTIAL PAYMENT: What is not. Application of rents and profits of lands by a grantee in possession under deeds operating as mortgages, to the payment of the debt secured, will not operate to take a suit by the grantor to recover the lands, from the bar of the statutes of limitations, no voluntary payment by the grantor having been made; it not appearing that grantee ever acknowledged the transaction to be a trust or that grantor made any payment accepted by grantee or that within the period of the statute there was any recognition of grantee's rights; and there being, at all events, no showing of the amount of rents and profits received or when they were received.

CONTINUING FORECLOSURE: What is not. Where a grantee of lands, conveyed by deeds operating as mortgages, entered into possession of the lands at time of conveyance under an agreement with the grantor that he should hold them as security for a debt not then due, such possession does not constitute a continuing foreclosure so as to enable the grantor to maintain an action to redeem at any time during its continuance, free from limitations; since the right to foreclose did not accrue until the debt was due, and the right to redeem was contemporaneous therewith.

NEW ACTION: Extension of time. Revised Statutes Illinois, chapter 83, section 25, provides that, if a plaintiff commence a new action within one year after a nonsuit, it shall have the effect of reviving the first. Plaintiff's action was dismissed for want of prosecution, and six months given him to reinstate it. He commenced a new action more than one year but within eighteen months after such dismissal, and after his original cause of action was barred. *Held*, that the six months given for reinstatement did not extend the statutory time for bringing a new action, and, hence, plaintiff's action was barred.

Laches: Where a plaintiff allows over twenty years to elapse before beginning a suit to recover lands conveyed by deeds operating

3 4 as mortgages under contracts of defeasance, his claim is stale,
10 and his laches such as to preclude him from equitable relief.

Appeal: DEMURRER: *Pleading over.* Where plaintiff's demurrer to
defendant's answer is *overruled*, and exception taken, and
2 plaintiff then files a reply to the answer, he thereby waives his
right to complain of the overruling of his demurrer, on appeal.

Appeal from Des Moines District Court.—HON. W. S.
WITHROW, Judge.

FRIDAY, APRIL 13, 1900.

SUIT in equity to enforce a trust in certain real estate in favor of plaintiff, to redeem, and for conveyance of the title thereto. The trial court sustained a demurrer to plaintiff's reply, and on the hearing dismissed the petition. Plaintiff appeals.—*Affirmed.*

Seerly & Clark for appellant.

E. S. Huston for appellees.

DEEMER, J.—On December 24, 1873, plaintiff's grantor, one C. C. P. Holden, executed to C. N. Holden a deed for about four thousand acres of land situated in Des Moines county, Iowa; the grantee assuming mortgages and liens on the property amounting to ten thousand dollars. This deed, while absolute in form, was intended as security to save the grantee harmless because of his having indorsed notes for his grantor to an amount exceeding thirty-one thousand dollars. Certain notes, bonds, and stocks were also deposited with C. N. Holden as additional security; and from these collaterals, it is claimed, he realized something like twenty-six thousand dollars. C. N. Holden took possession of the real estate at the time the deed was made, and he and his heirs and assignees have collected the rents and profits of the land. On February 23, 1875, Louise R. Jones, who afterwards intermarried with C. C. P. Holden, also executed a deed for certain other lands in Des Moines county to C. N.

Holden to secure the grantee on his promise to pay certain mortgages and judgments that were liens on the said property. It is alleged that C. N. Holden, instead of carrying out his agreement, transferred the land received in virtue of the deed to his brother, A. H. Holden; that this last transfer was without consideration, and with full knowledge on the

part of the grantee therein that the original deeds
1 . were intended for security. At the time of the execu-

tion of the deed of February 23, 1875, C. N. Holden made and delivered the following agreement to reconvey: "Holden & Moore, Law Office, 152 Dearborn Street. Chicago, Feb. 23d, 1875. To Chas. C. P. Holden: Upon settlement with me, and payment of any and all balances due me, and upon settlement and payment by you of what is or may be owing to Albion H. Holden from you, I agree to reconvey to you or to your order any lands remaining in my name in Des Moines county, Iowa, which I have received from Louise R. Jones or from you, except the lands described in the deed from you to me dated Feb. 23d, 1875. I am to have the right to sell any of said lands, and use the proceeds on your account, except those described in the deed of this date. Such payments by you are to be made on or before May 1st, A. D. 1877. [Signed] C. N. Holden." Plaintiff alleges in his petition that defendant and his ancestors have been in possession of the property, collecting rents and paying taxes, but that he has no means of knowing how much has been received, nor what taxes have been paid; and he asks an accounting for the rents and profits, and an adjustment of the indebtedness. He offers to pay any amount found due from his grantor, and prays that the deeds be decreed mortgages, that title to the property be held in plaintiff, and for general equitable relief. C. N. and A. H. Holden are both dead, and defendants are their widows, heirs, and legal representatives. As such, they filed answers denying the allegations of the petition, and pleading the statute of limitations, both of the state of Illinois, where all

parties resided, and of the state of Iowa, where the land is situated. These pleas are in different divisions of the answer. Defendants also pleaded laches and an equitable estoppel, based on plaintiff's delay in bringing action. Defendant Frances W. Holden, widow of C. N. Holden, also pleaded a former adjudication by decrees of the superior court of Cook county, Illinois. Plaintiff filed a demurrer to the second, third, fourth, and fifth divisions of defendant's answer, pleading the statute of limitations, on the grounds that the facts stated did not entitle defendants to the relief demanded. This demurrer was overruled, and exception taken. Thereafter plaintiff filed a reply to the answer. By so doing he waived his right to complain of the ruling. *Krause v. Lloyd*, 100 Iowa, 666; *Frum v. Keeney*, 109 Iowa, 393. In his reply, plaintiff pleads: That as C. N. and A. H. Holden went into possession of the lands under deeds absolute on their face, but intended as security only, they became trustees, and that having collected the rents from the property, and applied them in payment of the debt secured, the case is taken out of the statute of limitations of Illinois, because of such payments. *Second*. That taking possession of the property for the purpose of paying the debt is one of the means of foreclosure in the state of Illinois, and that therefore the statute has not run. *Third*. That by a decree of the superior court of Cook county, Ill., it was determined, in an action to which these defendants were parties, that the deeds to C. N. and A. H. Holden were simply mortgages, and an accounting was ordered; that this case was finally dismissed for want of prosecution, but that within one year thereafter a new bill was filed for the purpose of having an accounting; and that by the statutes of Illinois (section 25, c. 83, Rev. St.) an action commenced within one year after nonsuit revives the former action, as against the plea of the statute of limitations. Defendants' demurrer to this reply was sustained, and it is this ruling that the record presents for re-

view. Plaintiff contends that defendants hold as trustees, and that the statute does not begin to run until a denial or repudiation of the trust; that time is no bar to a trust; that express trusts are not within the statute; and that when the debt was discharged there was a resulting trust in favor of the grantor, against which the defendants could not plead the statute. He further contends that, even if the case is within the statute, the bar has been removed because of payments made on the debt from time to time by reason of the proceedings and decree in the superior court of Cook county, Ill., and that defendants were simply foreclosing their mortgages while in possession, and applying the rents and profits to the debt, and that while they were in possession, and collecting the rents and profits for the satisfaction of the debt which the conveyances were made to secure, the statute could not run. On the other hand, it is insisted that this is nothing more than an action to redeem; that payments made from time to time were not voluntary, and therefore did not take the case out of the statute; that the effect of the possession of the grantee and his heirs is to be determined by the laws of this state; and that the mere fact of their possession does not stop the running of the statute against the debt. Defendants also contend that the demurrer was correctly sustained because of plaintiff's laches.

Some, if not all, of these questions, have heretofore been determined by this court. That a deed absolute on its face may be shown to be a mortgage is so well settled that it is useless to cite authorities. As the deeds in question
4 were nothing more than mortgages, the original grantor and his grantee have the right of redemption. This right cannot be cut off by agreement of the parties, nor by the mortgagee's possession, and exists until barred by statute. When the right is sought to be exercised, the mortgagee or grantee in possession will be required to account for the rents and profits, and for all the proceeds of the land and other securities. A mortgage, in this state, does not

create an estate, but simply a lien or charge upon the land to secure the debt, and a suit for foreclosure is barred in ten years; and, as the rights of mortgagor and mortgagee are reciprocal, redemption under a mortgage will be cut off in the same time. *Gower v. Winchester*, 33 Iowa, 303; *Cunningham v. Hawkins*, 24 Cal. 409; *Crawford v. Taylor*, 42 Iowa, 260; *Green v. Turner*, 38 Iowa, 112; *Smith v. Foster*, 44 Iowa, 442. Under the contract of defeasance of date February 23, 1875, C. C. P. Holden was to make payment of the amounts secured by the deeds on or before May 1, 1877. Ten years from that time the grantee's right of action on the debt, and to foreclose the grantor's equity of redemption, was barred; and the grantee's right of action to redeem was barred at the same time, unless it be for some of the matters pleaded in reply, to which we will hereafter call attention.

But it is said in argument that defendants and their ancestors held the lands in trust for C. C. P. Holden, and that, as they did no act indicating an intention on their part to disavow or disaffirm the trust, they cannot plead the statute. True it is that a mortgagee or grantee in a deed made to secure a debt holds the title, in a certain sense, as trustee; but we have already seen that the statute of limitations applies to such a trust, although there has been no act indicating an intent to disavow it. Had the debt which the deeds were made to secure been fully paid, the mortgage character of the transaction would have ceased, and the grantee would thereafter hold that lands in trust; and as trustee he could not plead the statute of limitations for the purpose of securing or holding title, unless he had done some act indicating a disaffirmance of the trust. These, too, are elementary propositions, and we only cite *Conrad v. Insurance Co.*, 1 Pet. 386 (7 L. Ed. 189); *Murphy v. Murphy*, 80 Iowa, 740; *Dunton v. McCook*, 93 Iowa, 266; *Gebhard v. Sattler*, 40 Iowa, 157; and *Green v. Turner*, *supra*, in their support. Had the petition alleged payment of all the indebtedness that the deeds were made to secure, there would then appear

to be a resulting trust in defendants' ancestors, and in the absence of a disavowal of the trust the statute would not run. *Green v. Turner* and *Dunton v. McCook*, *supra*. There is no such allegation, however, and it clearly appears that this is an action to redeem and for an accounting.

6 Moreover, it appears from the allegations of the petition that in September of the year 1875 C. N. Holden sold the greater part of the land covered by his deeds to his brother, A. H. Holden. This was not in performance of the trust, but was in fact a disavowal of it. Plaintiff does not claim that this conveyance was in execution of the trust. On the contrary, he seeks to charge the lands because A. H. Holden and his heirs had knowledge of the fact that the deeds to C. N. Holden were intended as security, and took the conveyance with knowledge of the original grantor's rights. This conveyance should be treated as a repudiation of the trust. The cases of *Green v. Turner* and *Dunton v. McCook*, *supra*, relied on by appellant, are not, therefore, in point. The suit being to redeem, and to secure a reconveyance of lands in this state, it is barred by our statutes, unless it be for the fact that defendants are nonresidents. But as nothing is claimed by counsel for this, and as there is nothing in the pleadings to indicate that any reliance is placed upon it, we give the point no further consideration than to mention it, to the end that it may not appear to have been overlooked. As to the necessity of a pleading tendering this issue, see *Van Patten v. Bedow*, 75 Iowa, 589. We are not to be understood that nonresidence removes the bar. That question is left undetermined. Defendants plead in answer that the suit is barred by the statute of the state of Illinois, and refer not only to the statutes, but to certain decisions of the courts of that state. Thus, it was held in *Emory v. Keighan*, 94 Ill. 543, that an action to foreclose is barred in the same time as an action on the debt secured by the mortgage; and in the case of *Hancock v. Harper*, 86 Ill. 445, it is held that an action for an accounting brought by a grantor in a con-

veyance made as security for a loan, is barred in the same time as an action for a debt would be at law. Again, in *Locke v. Caldwell*, 91 Ill. 417, that court held "that the law of limitations as to the right of a mortgagee to foreclose and that of a mortgagor to redeem are mutual." The statutes of that state provide that actions to foreclose must be brought within ten years after the right of action or right to make sale accrues. Section 11, c. 83, of the Revised Statutes of 1891.

To avoid the effect of the bar of the statute of Illinois, plaintiff pleads that as defendants and their ancestors were in possession of the premises, and were collecting the rents and profits, they are presumed to have applied
7 the amount collected on the debt, and that these payments removed the bar. Had there been an acknowledgment by defendants or their ancestors of the trust character of the conveyances, or had it been shown that plaintiff or his grantor had made any payments that were accepted by the creditor or his representatives, or had there been, within the period of the statute, any recognition of the rights of plaintiff or his grantor, the rule contended for might obtain. *Schifferstein v. Allison*, 123 Ill. Sup. 662 (15 N. E. Rep. 275); *Brown v. Bookstaver*, 141 Ill. Sup. 461 (31 N. E. Rep. 17). But no such facts appear from the record. On the contrary, it seems that C. N. Holden transferred the property, or a large part of it, to A. H. Holden, and, for aught that appears, the original grantor has had nothing out of the land since the date of his conveyance. Moreover, if part payment of the debt from rents and profits be assumed, this payment was involuntary, and does not establish recognition of the debt by the grantor. *Thomas v. Brewer*, 55 Iowa, 227; *Wolford v. Cook*, 71 Minn. 77; (73 N. E. Rep. 706). But, if the receipt of rents and profits should be treated as payment, there is no showing as to when they were received, nor the amount thereof.

The reply further pleads that taking possession of the mortgaged property was simply a means of foreclosure, and that the statute would not run while the foreclosure proceedings were pending. Had the instruments executed by plaintiff's grantor been mortgages, and had the defendants' ancestors entered into possession for the purpose of foreclosing, the doctrine contended for by appellant might apply. But that, as we have seen, is not true. The grantee went into possession at the time the deeds were executed, and was to hold possession of the land as security. By reason of his relation to the property, he was charged with the rents and profits thereof. Neither the original grantee, nor his grantees or representatives, took possession for the purpose of foreclosing or collecting the amount due. That they had from the inception of the transaction, and, as we have seen, they have done nothing to remove the bar of the statute. At the time fixed in the defeasance contract, defendants' ancestor had the right to bring a suit to foreclose, and plaintiff's grantor at the same time had the right to bring an action to redeem. The continued possession of the grantee, even if shown, would not of itself extend this right. *Hallesy v. Jackson*, 66 Ill. 139; *Stevens v. Institution*, 129 Mass. 547.

Plaintiff also pleads that within ten years he commenced an action in the courts of Illinois to redeem and for an accounting, that this action was dismissed for want of prosecution, but that within the year allowed therefor by section 25, c. 83, of the Revised Statutes of Illinois, he brought another suit asking an accounting. It further appears that the first action was dismissed on June 23, 1890, for want of prosecution, with leave to reinstate in six months on good cause shown. No attempt was made to reinstate, and the second action was not commenced until November 30, 1891. The statute says, in effect, that, if plaintiff commence a new action within one year after the first one was given against plaintiff, it shall have the

effect to revive the first. The second was not commenced within one year from the time judgment was given against plaintiff in the first, and consequently this division of the reply does not avoid the statute. The right given to reinstate manifestly did not extend the time allowed by statute for the bringing of a new suit. We see nothing in the reply that avoids the defenses pleaded in the answer, and are satisfied that, under the issues as presented, plaintiff's action is barred both by the statutes of this state and of the state of Illinois. But, if this be not true, it is clearly barred by the statutes of this state. Even if there was error in sustaining the demurrer to some of the divisions of the reply, it was
10 without prejudice. We are more ready to reach this conclusion for the reason that plaintiff's delay and laches are such as to bar him of all relief in our courts. Had there been no express statute, equity would have applied its rules in analogy to the law, and defeated plaintiff because of the staleness of his claim. The ruling on the demurrer was right, and the judgment is **AFFIRMED**.

F. H. WRAY, Appellant, v. GEORGE B. WARNER.

Notes and Bills: **TRANSFER:** *Fraud.* Where a note given for the right to sell a patent rupture cure was immediately transferred by the payee to the business manager of the rupture cure company, on whose representations as to the character of the cure
7 the note was executed, an instruction that if the note was obtained by false representations of such manager, it became invalid when it passed into his hands, even though it might have been valid in the hands of the original payee, was not erroneous, since the manager was not a mere indorsee, but a party to the transaction.

RECOVERY BY INDORSEE. Under Code, section 3070, providing that on failure of the consideration given for a note the holder cannot recover a greater sum than he paid for it, with interest and
8 costs, where the evidence showed that plaintiff was a *bona fide*

holder of such note, but did not show what he paid for it, an instruction that he could recover only a dime or a dollar was proper.

FAILURE OF CONSIDERATION: *Evidence.* Where several witnesses who had been treated for rupture by a patent cure testified that they had not been cured, and the originator of the cure swore that 12,000 persons had been cured in the United States, but
10 did not produce any one as a witness who had been cured, the jury was justified in finding that the cure was worthless, and that a note given for the right to sell it in a certain territory was without consideration.

INSTRUCTIONS: *Harmless error.* Where the plaintiff claimed to have purchased the note sued on for value, before maturity,
6 an instruction that the note was transferred to plaintiff immediately after its execution was not prejudicial to plaintiff.

Held not to be contradictory. An instruction that the plaintiff obtained the note sued on in the ordinary course of business for a valuable consideration, without knowledge of the representations made by his business manager in obtaining it, does
9 not contradict another instruction that the evidence was conflicting as to whether plaintiff had knowledge of the alleged want of consideration for the note; since the first instruction refers to a knowledge of alleged fraud, and the second to a knowledge of the want of consideration.

Evidence: **RELEVANCY:** *Act of third person.* W. had an arrangement with a patentee, under which he maintained an office to cure with patentee's cure. He brought defendant and another together and, as a result, defendant and that other engaged in
2 a like business, defendant giving to said other a note which
3 was transferred to patentee. In the letter-heads used in W.'s office he was styled "business manager" and, in correspondence patentee addressed him as "manager." *Held,* W. was not a stranger to the transaction which led to the making of such note but was in such privity to all the parties interested as that, in a suit upon the note, it was proper to admit in evidence conversations had with W. and letters from him to defendant recommending patentee's cure to the person with whom defendant associated and the purchaser of the territory in which to sell said cure, the note being given in consideration of such territory sold to defendant by his associate.

SAME: *Fraud.* Where defendant claimed that a note given for the right to sell a patent rupture cure was fraudulently obtained, a blank form of contract used by plaintiff in granting territory

4 to sell such cure was admissible in evidence to show the manner in which the business was transacted.

NON-EXPERTS: *Competency.* A man who had been treated for rupture by a patent remedy was competent to answer the question whether he was cured or not, though he possessed no
5 knowledge of medicine, since the question did not call for a conclusion requiring special skill on the part of the witness, but for the statement of a fact.

Appeal from Page District Court.—HON. WALTER I. SMITH, Judge.

FRIDAY, APRIL 13, 1900.

ACTION at law for judgment on a negotiable promissory note for five hundred dollars, executed December 21, 1896, by the defendant to W. D. Gibbon, due July 15, 1897, and indorsed: "Pay A. M. Worden, or order. [Signed] W. D. Gibbon." "Pay F. H. Wray without recourse on me. [Signed] A. M. Worden." "Pay to Charles E. Putnam, Cashier Merchants' National Bank of Cedar Rapids,
1 Iowa. [Signed] F. H. Wray." The defendant answered admitting the execution of the note, and alleging that the note is without consideration, was obtained by fraud, and that plaintiff is not a *bona fide* purchaser before maturity, without notice. The defendant also offered to rescind the transaction in which the note was given. The plaintiff replied, denying the allegations of the answer, and alleging that at the time he purchased the note he had no notice or knowledge of the alleged defenses, but purchased in good faith, for a valuable consideration, before maturity, in the ordinary course of business. Verdict and judgment were rendered in favor of the defendant. Plaintiff appeals.—*Affirmed.*

Geo. H. Castle and W. P. Ferguson for appellant.

G. B. Jennings for appellee.

GIVEN, J.—I. The plaintiff is the originator of what is known as the "Fidelity Rupture Cure," covered by trademark in the patent office of the United States dated January 2, 1896. The cure consists, in part, at least, of the use of

2 a fluid prepared by and obtainable only from the plaintiff at his place of business in Chicago. Dr.

A. M. Worden, of Des Moines, Iowa, under some arrangement with the plaintiff, maintained an office in that city for the treatment of patients by this cure. The defendant's minor son, A. D. Warner, was treated by Dr. Worden, and in the course of their acquaintance Dr. Worden urged upon him the purchase of the right to some territory in southwest Iowa in which to use said remedy, and highly recommended the cure as a sure and successful source of profit. A. D. Warner being a minor, Dr. Worden made efforts through him, and otherwise, to interest the defendant in the purchase of some territory. Neither of the Warners being a physician, and it being necessary to have a physician to administer the cure, Dr. Worden recommended Dr. Gibbon, of Beatrice, Neb., as a suitable person to administer the cure, and through his efforts these parties were brought together, and made an arrangement for opening an office in Red Oak, Iowa, young Warner to work at securing the patients, and Dr. Gibbon to administer the remedy. In some way that does not clearly appear Dr. Gibbon acquired the right to several counties in southwestern Iowa, and it was in consideration of the transfer to the defendant of an interest in these counties that the note in suit was given to Dr. Gibbon, in addition to five hundred dollars in cash paid him at the time. Dr. Gibbon and Warner continued this business for a few months, when Dr. Gibbon returned to Nebraska, and the office was closed. It seems probable that they abandoned the business because of the conclusion reached by Dr. Gibbon that the cure was not effectual. He says: "Think the fluid does not possess any curative qualities. I have not analyzed it, and do not know of what elements

it is composed." The note was indorsed as already stated, but seems to have been returned by the Merchants' National Bank of Cedar Rapids to the plaintiff.

II. We now notice certain complaints made by the appellant of rulings on taking the evidence. He insists that Dr. Worden was a stranger to this transaction, and therefore the court erred in admitting in evidence conversations with him and his letters to the defendant and to his son, recommending the cure, recommending Dr. Gibbon, and also urging the purchase of territory. Just what Dr. Worden's relations were to the plaintiff does not clearly appear. It is said that he was acting independently of the plaintiff, but it appears that he was promoting the plaintiff's business. In the letter-heads used in the Des Moines office, Dr. Wray was designated as "originator," Dr. Ransom as "specialist," and A. M. Worden as "business manager," and Dr. Worden was addressed by the plaintiff in correspondence as "manager." Dr. Worden was not a stranger to this transaction, but in such privity to all the parties to it as to render the evidence objected to admissible.

Appellant complains of the admission of certain blank forms of contract. We are inclined to think that they were proper as tending to show the manner in which this kind of business was done, and the terms offered in this instance; but, if not, they were surely without prejudice to the appellant.

It is complained that witnesses who had been treated with this cure were permitted to answer "whether [they] were cured or not." It is argued that these were ignorant men, possessing no information or competency to answer the question, and that the answer is a conclusion. It certainly requires no special skill or learning for a man who has been suffering from a rupture to know whether or not it has been cured; and to say that it has or

has not been cured is the statement of a fact. We discover no errors prejudicial to appellant in the rulings on taking the evidence.

III. We next notice appellant's complaints against the instructions. It is complained that the court said that the note in suit was, "immediately after its execution, transferred to A. M. Worden." We think the evidence
6 sustains this statement, but, if it were otherwise, it would be without prejudice to the plaintiff, as it tends to support his claim that he became purchaser before maturity. In the fourth and fifth instructions, the court, having said that the note passed into the hands of
7 Worden shortly after its execution, added: "This being true, if the note was obtained by false pretenses, made by said Worden, the note became invalid when it passed into his hands, even though it might have been valid in the hands of the original payee." It is argued that there is no claim that Dr. Gibbon made any false statements to induce the giving of the note, and that, therefore, if the note was valid in his hands, it was valid in the hands of Worden, and that, Gibbon and Worden being intermediary indorsers, there is no privity between them, or either of them, and the plaintiff. Gibbon and Worden are more than mere indorsers. Gibbon was directly, and Worden indirectly, a party to the transaction in which the note was given. The argument ignores the fact that the transaction was induced upon the representations of Worden as to the character of the cure. Measured by the relation of indorsers and indorsee alone, appellant's contention is correct; but, as said, these parties were more than indorsers and indorsee in this transaction. We think, under the facts of the case, there was no error in this instruction.

The court instructed that: "So abhorrent is fraud, however, in the law, that even a *bona fide* purchaser of a promis-

sory note in the ordinary course of business, for a valuable consideration, before maturity, and without notice of fraud, can only recover upon such note, if procured by fraud, the amount actually invested by him, with interest. If, however, you find that Worden procured this note by fraud from the defendant, as plaintiff has failed to show how much he gave therefor, but has shown that, as respects the alleged fraud, he was a *bona fide* purchaser in the ordinary course of business, for a valuable consideration, before maturity, and without notice, your verdict should be for him for a dime or a dollar." There is no evidence whatever as to how much the plaintiff gave Worden for this note, and the instruction is in harmony with section 3070 of the Code. The court said in the fourth and fifth instructions that the evidence shows without conflict that the plaintiff obtained this note in the ordinary course of business, for a valuable consideration, before maturity, and without any notice or knowledge of the representations, if any, made by Worden for the purpose of obtaining it, and added that "the evidence is not conclusive either way as to whether he had notice of the alleged want of consideration for this note." Appellant does not complain of this, but contends that the court submitted a contradictory proposition as to whether the plaintiff was an innocent purchaser. The further instructions were as to his knowledge of the want of consideration, not knowledge of the alleged fraud. We discover no errors in the instructions.

IV. Appellant insists that there is not sufficient evidence to sustain the verdict. We think the jury were warranted in finding from the evidence that the Fidelity Rupture Cure is worthless, and of no value; therefore that there was no consideration for the note in suit. They were also warranted in finding that the plaintiff, when he took the note in suit, knew what the consideration therefor was. He was an originator of the cure, knew of what it consisted, and results from its use. True, he testifies: "The Fidelity

Rupture Cure is valuable, and possesses merit, and is effective in curing rupture when placed in the hands of proper persons to administer the same, and no person or persons are permitted to use the same without paying me a
 10 valuable consideration. The treatment has been in use since 1891, and offices have been opened throughout the United States, and over 12,000 persons have been treated and cured by the method,"—yet no one of these is called to corroborate the statement, while A. D. Warner, who was treated by Dr. Worden, several others treated by Dr. Gibbon, whom Dr. Worden recommended, and one or two treated by Dr. Ransom, in Omaha, each testifies that he was not cured by the treatment. We need not discuss the evidence further on this subject. Our examination of the record before us leads us to the conclusion that the judgment of the district court should be AFFIRMED.

STATE OF IOWA V. WILLIAM J. BAUGHMAN, Appellant.

Criminal Law: SETTING ASIDE INDICTMENTS: *Grounds.* The grounds specified in Code, sections 5319-5321, on which a motion may be based to set aside an indictment are exclusive of others not named, and such motion cannot be founded on the fact that a
 1 member of the grand jury finding the indictment had previously formed and expressed an unqualified opinion of the defendant's guilt; that not being one of the grounds enumerated.

NEW TRIAL: *Misconduct of juror.* Where a juror, during the trial, stated in a conversation with a stranger that he was convinced of defendant's guilt, and that it would require a great deal of evidence to change his mind, and when told that evidence might be introduced that would change his conclusions remarked that it could not be done, such remarks, though a violation of his duty, did not indicate a personal bias or prejudice, but were merely an expression of his opinion that the evidence pointed so strongly to defendant's guilt that the defense would be unlikely to overcome it, and, no harm appearing to defendant, it was not error to refuse a new trial therefor.

Instructions: WHEN NO INFRINGEMENT OR PROVINCE OF JURY. Expressions in the instructions that "evidence has been introduced

111	71
113	521

111	71
119	659

111	71
121	520
122	662

111	71
136	75

111	71
140	669

tending to show" certain facts which were in issue, were not
2 objectionable as intimating to the jury the opinion of the court
concerning the issues. *State v. Donovan*, 61 Iowa, 370, and
State v. Dorland, 103 Iowa, 174, distinguished.

Appeal from Cass District Court.—HON. W. I. SMITH,
Judge.

FRIDAY, APRIL 13, 1900.

THE defendant appeals from a judgment convicting
him of having committed the crime of incest with a sister.—
Affirmed.

Bryant & Bryant and *T. B. Swan* for appellant.

Milton Remley, Attorney General, and *Chas. A. Van
Vleck*, Assistant Attorney General, for the State.

LADD, J.—Though not held to answer on preliminary
examination, the defendant moved to set aside the indict-
ment because a member of the grand jury returning it had
previously formed and expressed an unqualified opinion of
his guilt. This, a cause for challenge by one held to answer
(section 5243, Code), is not recognized by the statute as a
sufficient reason for setting aside an indictment. Section
5319 of the Code enumerates five grounds, numbering them,
on one or more of which the motion to set aside must be
sustained. The following sections provide for obviating
this by correcting an omission to indorse the names of wit-
nesses, and section 5321 denies the fifth ground—objection
to the panel—to one held to answer. In previous sections
(chapter 13, title 25) the right to the exercise of challenges
to the panel and to individual jurors is given a person held
on preliminary examination. Had the lawmakers intended
the challenge to individual jurors to be available to one not
bound over, this would, doubtless, have been mentioned
among the grounds stated for setting an indictment
1 aside. Specifying particularly what might be the
basis of such a motion, in view of prior provisions,

and the subsequent reference to corrections and an exception, clearly indicates the purpose of the legislature that the grounds enumerated should be exclusive of all others. Going back of indictments for facts to abate or quash them—usually because of disqualifications or misconduct of grand jurors—formerly led to great delays and abuses; sometimes to the miscarriage of justice. Our statutes were enacted to simplify the practice as far as practicable, and do away with merely dilatory pleas. To this end objections which may be interposed, and the time, has been definitely fixed. Thus, in *State v. Russell*, 90 Iowa, 569, the motion to set aside, for that a brother of the injured party was a member of the panel was overruled; this not being one of the statutory grounds. The same ruling has been repeatedly made where the insufficiency or incompetency of evidence before the grand jury was the cause assigned. *State v. Tucker*, 20 Iowa, 508; *State v. Morris*, 36 Iowa, 272; *State v. Fowler*, 52 Iowa, 103; *State v. Smith*, 74 Iowa, 584. The supreme court of Oregon has held that only the enumerated grounds were available for such a motion. *State v. Whitney*, 7 Or, 386. That of South Dakota has reached the same conclusion. *State v. Bank*, 3 S. D. 52 (51 N. W. Rep. 338). See, contra, *State v. Brecht*, 41 Minn 52 (42 N. W. Rep. 603). Whether the court, in furtherance of justice, has the inherent power to set aside an indictment when procured through exceptional means, not referred to in this title,—as through misconduct of the judge, mentioned in *State v. Will*, 97 Iowa, 58,—ought not to be determined until necessarily involved. The only statutory guide defining the manner of performing their duties by the grand jury is the oath prescribed, copied in subsance, from that which has long been administered in England, followed in many states of the Union, where it has been uniformly regarded as an examining and accusing body, rather than a judicial tribunal. Our statute makes it the duty of every member of the panel knowing or having rea-

son to believe that a public offense has been committed, triable in the county, to inform his fellow jurors, and be sworn as a witness upon the investigation. Code, section 5260. This alone precludes the notion of an absolutely impartial trial before that body. It is accordingly held that, the fact of a member of the panel having formed or expressed an opinion of the guilt of the accused furnished no objection to the validity of the indictment. *State v. Fitzgerald*, 63 Iowa, 270; *State v. Rickey*, 10 N. J. Law, 83; *State v. Hamlin*, 47 Conn. 95; *Musick v. People*, 40 Ill. 268; *Lee v. State*, 69 Ga. 705; *U. S. v. Williams*, 1 Dill. 495, Fed. Cas. No. 16,716; *Com. v. Woodward*, 157 Mass. 516 (32 N. E. Rep. 939). See note to *State v. Russell*, 28 L. R. A. 200.

II. The expressions "evidence has been introduced tending to show sexual intercourse between the defendant and May Baughman," and "evidence has been introduced which tends to show that May Baughman became pregnant," found in the instructions, gave no intimation as to an opinion of the court concerning the issue being tried. Such evidence was before the jury, and the court could not well instruct without making some reference to it. *State v. Donovan*, 61 Iowa, 370, and *State v. Dorland*, 103 Iowa, 174, are not in point, as in those cases the word "some," in referring to evidence, was condemned, in that it conveyed an intimation of the court's view of its quantity and weight.

III. From the affidavit of Towne it appears that during the trial a juror stated, in conversation at the former's home, in substance that he was convinced of the defendant's guilt, and that it would require a good deal of evidence to change his mind; and, further, that he understood that defendant's father had been guilty of the same crime, and had run away. Towne claims to have advised him not to talk that way, as evidence might be offered to change his conclusions, and that the juror stated

"it couldn't be done." The rule generally laid down is that the irregularity, to raise a presumption of prejudice in the absence of connection therewith by either party, must be such as has a natural tendency to disqualify the juror for the proper and unbiased discharge of his duties. 2 Thompson Trials, section 2618. That his conduct was reprehensible is not questioned, but the expression of an opinion drawn from the evidence alone does not, of necessity, indicate undue bias against the accused. True, the court is required to admonish the jury, before each separation, not to converse among themselves or with others on any subject connected with the trial, and not to "form or express an opinion thereon until the cause is finally submitted to them," and this it is the duty of each juror to obey. Code, section 5383. Notwithstanding this, however, every lawyer knows that, as the trial progresses, the judge and every intelligent juror acquires an opinion, and this no act of legislature or admonition of the court can wholly prevent. It must not be overlooked that it is the fact of an opinion being entertained, and not its disclosure by a juror, that forms the objection. The disclosure is evidence only of the opinion being held. "If the entertainment of an opinion of the subject-matter of the trial by a juror during its progress furnished ground for a new trial, no litigated matter could be brought to a close, for, from the very constitution of the human mind, opinions will be formed as facts are disclosed or reasons addressed to the understanding, liable to be and frequently changed, as these facts and reasons are met and confuted by others of an opposite tendency." All that may be insisted upon is that the minds of the jurors be kept in a receptive attitude, ready to receive any information to be obtained throughout the trial, and accord it proper consideration. If a juror inadvertently mentions the case, or indicates his convictions at the time being to a person in no way connected with the trial, or interested in the result, and by whom no attempt to influence is made, it does not follow

that, because of such opinion, he will turn a deaf ear to evidence subsequently given on the part of the defendant. Nothing said indicated personal bias or prejudice, and, in the absence of any showing to the contrary, it cannot be fairly said that any possible pride in an expressed opinion triumphed over the obligation assumed on entering the jury box to listen to and fairly weigh the whole evidence. What the juror said amounted to no more than an expression of his notion that the evidence pointed to the defendant's guilt, and that the defense would likely be unable to overcome it by any which might be produced. It was not necessarily calculated to impress the case on the juror's mind in a different aspect than that made by the evidence. While his conduct is to be condemned, it does not appear to have worked harm to the defendant. Misconduct does not entitle the defeated party to a new trial, unless it may be said to have influenced the result. It may furnish ground for the juror's punishment, but should not necessarily affect the parties to the suit when entirely innocent of wrongdoing. A large discretion in the matter of determining the effect of misconduct of jurors is necessarily lodged in the trial court (*Perry v. Cottingham*, 63 Iowa, 41), and we are of opinion it was not abused in this case. See 12 Enc. Pl. & Prac. 563; *McAllister v. Sibley*, 25 Me. 474; *State v. Craig*, 78 Iowa, 642; *Pettibone v. Phelps*, 35 Am. Dec. 90; *State v. Allen*, 89 Iowa, 51; *Com. v. Sallager*, 3 Pa. Law J. 511. The last case is precisely in point. Mention of the rumor concerning the father requires no attention, as it is not shown to have influenced the decision.

IV. The affidavits of newly-discovered evidence do not strictly contradict the testimony of Dahl that defendant intimated his guilt in a conversation with him. The statute does not authorize a new trial on this ground (*State v. Bowman*, 45 Iowa, 421), and it cannot be said that, because of the failure to call these affiants, the defendant was deprived of a fair and impartial trial. See *State v. Foster*, 91 Iowa,

164. The record, as a whole, fails to show misstatements of the law by the county attorney. But see *State v. Toombs*, 79 Iowa, 744. The evidence was in conflict, and the verdict must stand.—AFFIRMED.

WM. OTIS RANSOM, Appellant, v. THE CITY OF BURLINGTON.

Paving Tax: CONVEYANCE TO AVOID. Plaintiff conveyed a fifteen-foot strip abutting a street to P., who was a cousin of plaintiff's divorced wife, to avoid a paving assessment. Plaintiff had no
1 negotiations with P., and the latter never asked for a deed, or
2 agreed to accept one, and paid nothing therefor. Plaintiff sent
3 the deed to P., and it was returned to plaintiff's divorced wife. Plaintiff had it recorded at her request, and returned it to her. For whom she was acting does not appear, all inferences indicating that it was for plaintiff. Plaintiff paid taxes on the property, ostensibly for P., but without P.'s request, and without informing anyone interested in P.'s estate of the fact. *Held*, that the conveyance was but an artifice, which did not pass title, and did not exempt plaintiff's property adjoining such strip from assessment.

SAME. While one may lawfully dispose of his property to escape
2 taxation, even of a general character, the law will not uphold
3 any mere manipulation under the guise of a disposition, the only effect of which is to defeat the tax.

Appeal from Des Moines District Court.—HON. W. S. WITHROW, Judge.

FRIDAY, APRIL 13, 1900.

ACTION in equity to cancel an assessment for paving a street, made against real estate belonging to plaintiff. The answer put plaintiff's right to the relief in issue. There was a trial to the court, and from a decree dismissing the petition at plaintiff's costs, he appeals.—*Affirmed*.

E. S. Huston for appellant.

Geo. S. Tracy for appellee.

WATERMAN, J.—The facts are not in dispute. Plaintiff was the owner of a tract of land in Burlington which had a north frontage on Grand street of two hundred and ninety-three feet. In August, 1895, a resolution to pave Grand street was duly adopted by the city council. September

1 ber 6, 1895, plaintiff executed to one Charles G. Perkins a deed for the north fifteen feet of said tract.

September 30, 1895, the resolution to pave Grand street was vetoed by the mayor. On May 3, 1897, a further resolution to pave said street was adopted by the council. Bids were solicited for the work, and on May 16th following the contract was let. Later an assessment for a part of the cost of such work was levied against the land of plaintiff, no regard being had to the conveyance of the fifteen-foot strip. Plaintiff's claim is that the strip conveyed to Perkins is alone subject to assessment, no part of the remaining real estate abutting on the street while defendant contends that the conveyance to Perkins was merely pretended, that it was fraudulent, being voluntary, without consideration, and made for the express purpose of defeating the assessment, and therefore it should be disregarded. It will be noticed that a resolution ordering the paving of Grand street had been adopted when the conveyance to Perkins was made. It was vetoed thereafter Plaintiff admits that his purpose in making the deed was to relieve his property from the burden of an assessment that seemed pending. The assessment here amounts to seven hundred and seventy-nine dollars and fifty-eight cents. The value of the fifteen-foot strip is about one hundred dollars. If plaintiff's claim is sustained, his property practically escapes liability for the improvement made.

While one may lawfully dispose of his property to escape taxation,—even taxation of a general character,—the law will not uphold any mere manipulation, under the guise of disposition, the only effect of which is to defeat

1 a tax. *Mitchell v. Board*, 91 U. S. 206; *Shotwell v. Moore*, 129 U. S. 590 (9 Sup. Ct.

Rep. 262.) Unless the conveyance to Perkins was valid as against plaintiff, he surely has no standing in court; and we think, in a case of this kind, after the grantor's intent is shown, the burden rests upon him to establish the validity of the transfer,—that is, to show he has really, and not colorably, merely, parted with his title. Perkins, the grantee, lived in Chicago. He was a cousin of plaintiff's divorced wife, Sue L. Ransom. Mrs. Ransom had some correspondence with him before the deed was made, but what was said does not appear. Plaintiff is not shown to have had negotiations with him; nor is it shown that Perkins ever asked for a deed, or agreed to accept one. He paid no consideration whatever, and, so far as appears, never accepted this conveyance. After the deed was made, plaintiff sent it by mail to Perkins, and it was returned to Mrs. Sue L. Ransom. Plaintiff took it from her, and, at her request, recorded it. After its record, he returned it to her. Whom she was acting for, does not appear, except by inference, and that warrants us in thinking she was acting for plaintiff. In March, 1897, plaintiff paid the taxes on the fifteen-foot strip,—he says, for Perkins; but it does not seem that Perkins requested him to do so, or that any one interested in Perkins' estate (he is now dead) has ever been informed of the fact.

The cases heretofore before this court, involving transactions somewhat similar to the one under consideration, were disposed of on grounds quite different from those which we regard as controlling in the case at bar. See *Eagle Mfg. Co. v. City of Davenport*, 101 Iowa, 493; *Smith v. City of Des Moines*, 106 Iowa, 590. We need not discuss the effect of a transfer such as was attempted in this case, when valid between the parties, and operative to pass title. We do not wish anything said here to be taken as applying to such a case. This deed was but an artifice. No title in fact passed by it. *Fass v. Seehawer*, 60 Wis. 525 (19 N. W. Rep. 533), is a very similar case, and the

holding there supports our conclusion that the district court was fully justified in dismissing plaintiff's petition.—AFFIRMED.

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131 678

STATE OF IOWA, Appellant, v. TED EVANS.

Appeal: RESUBMISSION TO GRAND JURY. NOT A FINAL JUDGMENT. An indictment against defendant for committing a liquor nuisance was set aside as defective, and judgment was entered that the cause be resubmitted to the grand jury, that the petit jury
1 impaneled be discharged, and that defendant recover costs, from which judgment the state appealed. *Held*, that under Code, section 5448, providing that appeals can only be taken from final judgment, by the state or by the accused, the appeal should be dismissed, the judgment not being final, as, on a new indictment, there can be a prosecution of the case to final judgment.

Criminal Law: RESUBMISSION: *Final adjudication.* It is held *arguendo* that under Code, section 5331, providing that where demurrers to indictment are sustained on other grounds than those which are a legal defense or a bar to the indictment, the court may order the cause resubmitted to a grand jury, and any bail given to remain in force, a judgment, entered on a defective indictment after the taking of testimony begun, that the cause be resubmitted to a grand jury, that the petit jury
1 be discharged, and that defendant recover his costs, not being a final judgment, does not discharge defendant or exonerate his bail.

Appeal from Mahaska District Court.—HON. JOHN T. SCOTT, Judge.

FRIDAY, APRIL 13, 1900.

THE defendant was indicted for causing a nuisance, in that he unlawfully did use "a certain building and restaurant situated in the town of Muchakinock, in said Mahaska county, Iowa, under the control of said Ted Evans, for the purpose of unlawfully selling certain intoxicating liquors, to-wit, rum," etc. The defendant pleaded not guilty, and on the trial the

is one room building. Defendant has another room a few feet away from the saloon, which he uses as a restaurant. The defendant runs and controls both the saloon and the restaurant. I have been in defendant's restaurant on Sunday's." He also answered that he had been in the saloon during the week, and was then asked: "Q. How late at night?" Defendant objected, "as immaterial, because the indictment charges him with keeping a nuisance in the restaurant." The objection was sustained, the court saying: "It now appearing to the court that the indictment in this case is defective, the same is set aside, and the matter ordered resubmitted to the grand jury;" to which the state excepted. The judgment entry recites the appearance of defendant and of counsel, the impaneling of the jury, and commencement of the trial, and proceeds as follows: "And, afterwards, it appearing to the court that the indictment in this cause is defective, it is therefore ordered by this court that the said indictment be, and the same is hereby, set aside, and the cause be resubmitted to the grand jury; and it is further ordered that the petit jury impaneled herein be discharged. To the setting aside of the indictment and discharge of jury the plaintiff at the time excepted. It is therefore ordered and adjudged by the court that the defendant do have and recover of and from the plaintiff the costs herein, taxed at \$——." From this judgment the state appeals.—*Dismissed*.

Milton Remley, Attorney General and *Geo. W. Lafferty*, County Attorney, for the State.

Jas. Carroll and *Ben McCoy* for appellee.

GIVEN, J.—I. This appeal is not, as defendant's counsel seem to regard it, from the order resubmitting the case only, but it is from the judgment as rendered, and it is of that part which set aside the indictment and discharged the

jury that the state complains. Appeals in criminal cases, whether by the state or the accused, "can only be taken from the final judgment." Code, section 5448. *State v. Swearengen*, 43 Iowa, 336; *State v. Davis*, 47 Iowa, 634. Is this a final judgment? Section 5272 of the Code provides that "the charge" be again submitted, and the defendant continued in custody, or on bail, whom the grand jury have failed to indict on the first submission. Section 5324, in relation to setting aside indictments, provides: "If the motion be granted, the court must order the defendant, if in custody, to be discharged, or, if admitted to bail, that his bail be exonerated, or, if he has deposited money instead of bail, that the money deposited be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury." Section 5331 of the Code, in relation to demurrers to indictments, contains the following: "If sustained because the indictment contains matter, which is a legal defense or bar to the indictment, the judgment shall be final and the defendant must be discharged; if sustained on any other ground, the defendant must be discharged and his bail exonerated, if bail has been given, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment, in which case the court may order the cause to be re-submitted to the same or another grand jury, and the defendant may be held in custody, if not at large on bail, in which case the undertaking given shall remain in force." If there had been no order resubmitting the case, the judgment would have ordered the discharge of the accused, and exonerated his bail, and this would have been a final judgment; but, there being such an order, the defendant is not discharged, nor his bail exonerated. By the finding of an indictment this case was brought into existence against the defendant. It is this case that the statute authorizes, under the conditions named, to be resubmitted, and it is this "cause" that was ordered resubmitted. A reindictment is a substitution of the second charge for the

first, and a grand jury alone can do this. Therefore, we have these provisions for resubmitting "the cause." If the statute of limitations was asserted against the second indictment, the first having been returned within the time required, the state would hardly concede that the judgment setting aside the first indictment, and ordering the case resubmitted, was a final judgment. Concede that the court erred in the judgment it rendered, the state was not materially prejudiced. It might go forward in the prosecution of this case to a final judgment. It surely has little to gain by this appeal; but, be that as it may, we are of the opinion that, a resubmission having been ordered, there has been no final judgment in this case from which either party can appeal. The motion to dismiss the appeal is sustained.—DISMISSED.

SUSAN GILES, Appellant, v. THE CITY OF SHENANDOAH.

Injuries Due to Defective Walk or Street: NOTICE OF INJURY: *Insufficiency.* Under Code, section 3447, barring action for injuries sustained by reason of a defective street or sidewalk in ninety days, unless written notice, specifying the time, place, and "circumstances" of the injury, be served on the city within sixty days from the happening of such injury, where an action was brought more than ninety days after an injury occurred, and the only notice served on the city was a letter from plaintiff's attorney notifying the city that he had a claim for adjustment for an injury which occurred to the plaintiff at the intersection of Church street and Clarinda avenue on the evening of April 21st, a verdict for defendant was properly directed, since the notice contained none of the "circumstances" of the injury.

SAME. Since the statute applies to injuries resulting from defective "streets or sidewalks" the notice is required for injuries occurring in a ditch in a street.

OBJECT OF NOTICE. The object of the statute is to apprise the city of the location of the defect and circumstances attendant upon the injury so that its liability may be investigated while the facts are fresh and also that it may ascertain what evidence there

111	83
122	462

111	83
138	625

111	83
d139	585
141	206

111	83
144	262

2 may be of conditions then existing and the character of the injury, while witnesses are at hand.

Appeal: Averment of injury from improper lighting of street.

Where plaintiff's petition was dismissed because proper notice had not been served on the city of the injury alleged to have been occasioned by a defective sidewalk, a second averment in
3 the petition that injury was due to improper lighting of the street will not be considered on appeal as dispensing with the necessity of notifying the city of the injury, where no evidence was introduced at the trial to sustain such averment.

Appeal from Page District Court.—HON. A. B. THORNELL,
Judge.

FRIDAY, APRIL 13, 1900.

THE plaintiff stepped into a hole in defendant's sidewalk, April 21, 1897, causing her to fall into a ditch by it and break her arm. This action for damages was begun August 19, 1897. After the evidence on the part of plaintiff had been introduced, the court directed a verdict for the defendant on the ground that no notice specifying the circumstances of the injury had ever been served. From the judgment rendered thereon the plaintiff appeals.—*Affirmed.*

C. S. Keenan for appellant.

W. P. Ferguson for appellee.

LADD, J.—As the suit was begun more than ninety days after the accident, “unless written notice specifying the place and circumstances of the injury” was served on the defendant city within sixty days thereafter no action can be maintained. Chapter 25, Twenty-second General Assembly, as amended by chapter 63, Twenty-sixth General Assembly; Code, section 3447; *Pardey v. Incorporated Town of Mechanicsville*, 101 Iowa, 266; *Starling v. Incorporated Town of Bedford*, 94 Iowa, 194. The only notice served on
1 the defendant was that signed by plaintiff's attorney, demanding a settlement of the claim, with notice of

his lien, and containing these words: "You, and each of you, are hereby notified that the undersigned has for collection and adjustment a claim on account of an injury that occurred to Mrs. J. L. Giles, at the intersection of Church street and Clarinda avenue, on the evening of April 21st." This did not purport to give any of the circumstances of the injury, as required. So far as conveying information, the accident may as well have resulted from a falling sign, as in *Bliven v. City of Sioux City*, 85 Iowa, 346, or the breaking down of a bridge, as in *Sachs v. City of Sioux City*, 2 109 Iowa, 224, or the running away of a team, as from a defective sidewalk. The object of the statute is to apprise the city authorities of the location of the defect, and the circumstances attending the accident, with such reasonable certainty as shall enable them, not only to investigate the city's liability while the facts are fresh, but also to ascertain what evidence there may be of conditions then existing, and of the character of the injury, while witnesses are at hand. *Benson v. City of Madison*, 100 Wis. 312 (77 N. W. Rep. 161); *Owen v. City of Ft. Dodge*, 98 Iowa, 281. It is enough, however, that the legislature has prescribed the service of a notice specifying "the circumstances of the injury" within sixty days, to prevent the bar of the statute of limitations within ninety days; and, as this was omitted, the action cannot be maintained.

The appellant insist that, as she averred in the second count of her petition that the accident resulted from neglect to properly light the street, no notice was essential. 3 As no evidence bearing on this issue was introduced, the point is not presented by the record. Again, it is said the injury occurred in the ditch, rather than on the sidewalk. But the ditch was in the street, and, 4 by the express language of the act, notice is necessary "In all cases of personal injury resulting from defective streets or sidewalks."—AFFIRMED.

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132	536
e132	542

J. A. WARNER *et al.* v. F. K. STEBBINS *et al.*, Appellants.

Board of Health: JURISDICTION: *Right to transfer infected persons.*

Code, section 2568, provides that the mayor and city council shall constitute a local board of health, within the limits of their cities, and shall have the power to establish quarantine against all diseases dangerous to the public. Section 2570 provides that a local board of health may make such provisions as
 1 are best calculated to preserve the inhabitants from danger. *Held*, that section 2570 did not enlarge the territorial limits of a board of health's jurisdiction as prescribed by section 2568, nor authorize a city board of health to transfer one affected with a dangerous disease to the jurisdiction of another board.

RIGHT TO INJUNCTION. Code, section 2568, provides that the trustees of any township shall constitute a local board of health within the limits of the township, and shall have power to establish quarantine against dangerous diseases. *Held*, that where a
 1 city was about to establish a pest house on land owned by it in a township, and convey patients thereto, the trustees could restrain such action, without proof that the city was about to create a nuisance. The right to enjoin rests upon the power given local boards of health to protect their territory from infection.

POLICE POWER: *Conflict with corporate rights.* Code, section 2568, provides that the mayor and city council of each town or city, and the trustees of any township, shall constitute a local board of health, within the limits of their towns, cities or townships, and shall have power to establish quarantine against all diseases dangerous to the public. Section 880 provides that cities
 2 may acquire and hold ground outside of their limits for hospital purposes. *Held*, that under section 2568 the trustees of a township had power to restrain a city from establishing a pest house on land owned by the city in the township, since the health regulations of the state were a part of the police power, and if their enforcement abridged private or corporate rights, such rights must yield to the public good.

Appeal from Johnson District Court.—HON. JOHN T. SCOTT,
 Judge.

FRIDAY, APRIL 13, 1900.

THE plaintiffs are the trustees and township clerk of West Lucas township, Johnson county, and the defendants are the mayor, members of the city council, and health officers of Iowa City, constituting Iowa City township, in the same county. The defendants, as a board of health, had under their care and control in Iowa City township a person afflicted with smallpox, and others who had been exposed thereto, whom they were about to remove to a building erected upon land in West Lucas township, owned by the city of Iowa City, which it had purchased for hospital and other purposes. This is an action brought by the plaintiffs as a board of health to restrain the defendants from so doing. There was a trial in the district court, and a restraining order entered as prayed, from which the defendants appeal.—*Affirmed.*

W. H. Bailey and Baker & Ball for appellants.

Hart & Zmunt for appellees.

SHERWIN, J.—This case presents a question that has not heretofore been determined in this state, and involves the construction of the sections of the statute hereafter referred to. It is conceded that the land upon which the defendants sought to establish this pest house is entirely outside of the territorial limits of Iowa City and Iowa City township. Section 2568 of the Code provides as follows: "The mayor and council of each town or city, or the trustees of any township, shall constitute a local board of health within the limits of such towns, cities, or townships of which they are officers;" which board shall have power to "make such regulations as are necessary for the protection of the public health respecting * * * causes of sickness * * * and quarantine; to proclaim and establish quarantine against all infectious or contagious diseases dangerous to the public, and maintain and remove the same." This statute specifically defines the

territorial limits within which a local board of health may act. Within the limits defined, it is by law made the guardian of public health, and it is its duty to stand as a wall between the inhabitants of the territory over which it has jurisdiction and dangerous contagious diseases. Beyond its prescribed boundaries we think it has no power or authority. The power given to local boards by this statute is broad. It is in the nature of legislative power delegated to the officers of a municipality for the preservation and promotion of the public health, and, while its use as an instrument of oppression by the local authorities will not be permitted, acts done thereunder, in good faith and for the purpose of promoting the general health, and for the purpose of preventing the spread of dangerous contagious diseases, will be upheld by the courts. *Lawton v. Steele*, 119 N. Y. 226 (23 N. E. Rep. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813); *Milne v. Davidson* (N. S.), 5 Mart. 409, 16 Am. Dec. 189; *Thomas v. Town of Mason*, 39 W. Va. 526 (20 S. E. Rep. 580, 26 L. R. A. 727); *People v. Brady*, 90 Mich. 459 (51 N. W. Rep. 537); *City of Anderson v. O'Conner*, 98 Ind. 168; *Harrison v. Mayor, etc.*, 1 Gill. 264; *City of St. Louis v. Boffinger*, 19 Mo. 13; *Haverty v. Bass*, 66 Me. 71; *Train v. Disinfecting Co.*, 144 Mass. 523 (11 N. E. Rep. 929, 59 Am. Rep. 113).

The appellants contend, however, that a pest house is not a nuisance *per se*, and that plaintiffs can have no relief except upon proof that they were about to establish a nuisance.

A sufficient answer to this position is found in the statute itself, which gives the local board of health power to establish a quarantine against all infectious or contagious diseases, and this power is not simply the power to quarantine infected persons within its own territorial limits, but it has power to restrain such persons from coming within its limits. See *Harrison v. Mayor, etc.*, *supra*. If it may so restrain a person who is afflicted with a well-developed case of smallpox, the logical conclusion follows that it may restrain those who attempt to take him there, not be-

cause his presence there might constitute a nuisance, but upon the higher ground of public welfare and public policy. The plaintiffs, as members of the health board of West Lucas Township, would be remiss in their duty were they to permit smallpox patients to be domiciled within their jurisdiction, upon the theory that the disease might not spread. Section 2570 of the Code, which provides for the care of infected persons by the local authorities, does not in our judgment, enlarge, in any way, the territorial limits of their jurisdiction, nor authorize the transfer of the disease to the jurisdiction of another board of health.

Defendants' further contention is that section 880 of the Code, which provides that cities may acquire and hold ground outside of their municipal limits for cemetery and hospital purposes, gives them the right to establish a
2 pest house on the ground so owned by Iowa City, and that to deny this right is to abridge the city's rights.

It appears from the record that West Lucas township is thickly populated, and that an occupied dwelling house is situated not more than forty rods from the contemplated pest house, and that defendants have erected a temporary shed for such use. Whether a hospital is in fact located on the ground in question does not appear. If so, it is apparent that it is not for use as a pest house; for a temporary building has been erected for that purpose, as we have seen. We do not think this statute was intended to establish pest houses in thickly settled rural communities. It does not so read, nor does it fairly imply such intent. The health regulations of the state are a part of its police powers, and, if their enforcement abridges private or corporate rights such rights must yield to the general public good. The other questions referred to in argument by counsel for appellants we do not notice, because of their request that we decide this case on its merits between the two townships. Our conclusion upon the merits is that the defendants, acting as the board of health of Iowa City town-

ship, had no power to establish a smallpox pest house in West Lucas township against the objection of the board of health of said West Lucas township, and that an injunction will lie to restrain them from so doing. The judgment is **AFFIRMED.**

SARAH A. WATTS V. THE EQUITABLE MUTUAL LIFE ASSOCIATION OF WATERLOO, IOWA, Appellants.

Insurance Corporations: CONTRACTS: *Ultra vires.* Where an assessment life insurance association insured a person, by reinsurance, without a medical examination as required by its by-laws,

- 1 it cannot resist payment on the certificate for such reason, as a corporation may waive the provisions of its by-laws.

SAME: *Misconstruction of contract by insurer.* The fact that an insurer mistakenly deals with its contract as limiting the number of assessments permitted annually to a number—less than is

- 2 permitted by the laws regulating the insurer, will not sustain the defense of *ultra vires*.

CONSTRUCTIVE NOTICE OF CHARTER TO BENEFICIARY. Where the amount of the assessments provided for in an insurance contract was

- 3 lower than permitted by the charter of the association, the
- 4 insured is not charged with constructive notice of the articles of incorporation, so as to preclude a recovery on his contract.

ESTOPPEL: *Executed contract.* An assessment insurance company entered into a contract of reinsurance, by which the amount of the assessments to be paid by the assured was lower than the rate fixed in its charter. The assured paid all assessments

- 3 and in every way fulfilled his contract. *Held*, that as the com-
- 4 pany had received the benefits from such contract, the matter was within the general scope of its powers, no law was broken or public policy infringed, it would be estopped from denying its liability thereon.

Appeal from Polk District Court.—HON. THOMAS F. STEVENSON, Judge.

FRIDAY, APRIL 13, 1900.

ACTION in equity upon a certificate of life insurance, in which the plaintiff is named as the beneficiary. There was

111	90
117	86
111	90
122	285

111	90
124	656

111	90
127	33
127	359

111	90
136	89

111	90
139	80

111	90
144	557

a decree for the plaintiff. The defendant appeals.—*Affirmed.*

Bowen & Brockett and Baker & Ball for appellant.

F. W. Paschal for appellee.

SHERWIN, J.—On the twenty-eighth day of September, 1892, Dr. Jackson Watts held a certificate of membership in St. Stephen's Brotherhood, a mutual insurance company then doing business in this state. The plaintiff was the beneficiary named in the certificate. The defendant was at that time a corporation engaged in the same business. On the day named a written agreement was entered into by St. Stephen's Brotherhood and the defendant for a consolidation of the two companies. In this agreement the defendant stipulated to enter into a contract with each holder of a brotherhood certificate or policy to assume all liability on said policy; and on the same day a written agreement was entered into by Dr. Jackson Watts and the defendant as follows: "Whereas, Jackson Watts, of Des Moines, Polk county, Iowa, is a holder of certificate No. 332, issued by the St. Stephen's Brotherhood of Des Moines, Iowa, and as said brotherhood has entered into an agreement with the Equitable Mutual Life & Endowment Association of Waterloo, Iowa, whereby it has become consolidated with the said Equitable Mutual Life & Endowment Association, said association assuming liability to such of its members as may enter into a contract therefor with the said Equitable Mutual Life & Endowment Association: It is therefore hereby mutually agreed by and between said holder and the Equitable Mutual Life & Endowment Association that from and after the signature hereunto by said holder, and the return of this to the said association, he shall become a member of said association, and said association assumes all liability under this certificate, said brotherhood being released from such liability. Said holder agrees to pay all future assess-

ments, dues, or quarterly payments to the said Equitable Mutual Life & Endowment Association at its office in Waterloo, Iowa, in manner as provided by said certificate, and the conditions on the back of same; that all assessments shall be made upon the basis of published scheduled rates and dues of said brotherhood, and not otherwise. In the event of a claim hereon, it is agreed that the liability of the Equitable Mutual Life & Endowment Association, and payment by said association of benefits to beneficiary or holder of a certificate issued by said brotherhood, shall be governed by the terms of said certificate, and conditions on the back thereof, and by the articles of incorporation and by-laws of the Equitable Mutual Life & Endowment Association, as same now are, or may be hereafter amended, and not by the articles of incorporation and by-laws of the said brotherhood; the same now being obsolete, by reason of discontinuance of the organization. It is also agreed that for all claims based on accidental injury, whether partial or total disability, said holder shall be considered a member of the accident department, only, of the Equitable Mutual Life & Endowment Association, and for all death claims, a member of the life department; that, in event of forfeiture of membership from any cause, said holder agrees that reinstatement shall be had only by compliance with rules and requirements of the Equitable Mutual Life & Endowment Association." The St. Stephen's Brotherhood certificate was issued to Watts in October, 1889, when he was forty-nine years of age, and the rate of assessments per one thousand dollars for a person of forty-nine years dollars. By the articles of incorporation of the defendant, the rate of assessment was fixed at one dollar and twelve cents per one thousand dollars for a person forty-nine years old, and at the rate of one dollar and twenty-eight cents per one thousand dollars for a person fifty-two years of age,—the age of Watts at the time of his contract with defendant. It is contended by the appellant that the contract of consolidation above referred to, and the contract of reinsurance

with Dr. Watts, are *ultra vires* and void, and that the plaintiff cannot have the relief sought, for these reasons.

As to the contract of reinsurance, it is claimed:

(1) That no medical examination was made of Watts, as required by defendant's by-laws. This is true. But a corporation may waive the provisions of its by-laws, and the defendant must be held to have done so in this case.

1 *Morrison v. Insurance Co.*, 59 Wis. 162 (18 N. W. Rep. 13); *Weiberg v. Association*, 73 Minn. 297 (76 N. W. Rep. 37).

(2) That, by the terms of the certificate, Dr. Watts' assessments were limited to twelve per year, which limit was in violation of the law governing defendant in relation thereto. This contention of the defendant cannot be sustained, for the reason that we do not so construe the
2 certificate. We think no limit is therein placed upon the number of assessments for death during the year. If the defendant misconstrued its rights under the contract it certainly cannot be heard to say that its contract is *ultra vires* for that reason.

(3) That the rate of assessment provided for in the certificate adopted by it was lower than required by its articles of incorporation. This point we will consider later on.

It may be conceded for the purpose of this case that neither the articles of incorporation nor the by-laws of the defendant gave its board of directors any express power or
3 authority to make such a contract of consolidation as it did, or gave it express power to reinsure Watts on the terms it did. In the reinsurance of Watts, his assessments were fixed by the terms of the certificate issued to him by the St. Stephen's Brotherhood, and were lower than they were fixed by the articles of incorporation of the defendant. But it is conceded by the appellant that after this contract of reinsurance was made with Dr. Watts, and up to the time of his death, on the sixteenth day of October, 1897, he paid all assessments called for by the defendant, and in every

way complied with the terms of his certificate, and with the requirements thereunder. The assessments paid by him were received by the defendant and were used as other funds of a like nature, and he was in all respects treated as a member of defendant association. Under the conditions above stated, should a court of equity deny the plaintiff recovery on this contract with defendant, or should it be held that the defendant is estopped from denying its liability thereunder? The defendant was a mutual insurance company, organized upon the mutual assessment plan, whose object as stated in its articles of incorporation, was "benevolence and mutual assistance among its members and their families, or designated beneficiaries, by the collection of dues, assessments, or stated payments, and disbursements of the same to said members and beneficiaries, less the cost of maintaining the association." Its general plan and its method of conducting its business were like those of the St. Stephen's Brotherhood. Its expressed object, as seen above, was mutual insurance upon the assessment plan. Hence, in making the contract with Watts, it was within the general scope of its expressed power. Its board of directors, in thus acting, did not violate any law of the state, nor was the act in any way against sound public policy. It has been held by this court, and, indeed, it may be said to be the general rule, that a corporate act in violation of public law, or which is contrary to public policy, is absolutely void, because illegal, and that no private right can be based upon it, for that reason. But this is not such a case, and it may well be questioned whether the act complained of was beyond the power of the corporation. It is said that "acts which, if standing alone, or when engaged in as a business, would be beyond the powers of the corporation, are not necessarily *ultra vires*, when they are merely incidental to, or form part of, an entire transaction, that in its general scope is within the corporate purpose. *Central Ohio Natural Gas & Fuel Co. v. Capital Dairy Co.*, 66 Ohio St. 96 (53 N. E. Rep. 711). If a contract is intended to further the interests

and objects of a corporation, courts are slow to declare it beyond its power. *Railway Co. v. McDonald*, 17 Ind. App. 492 (60 Am. St. Rep. 172, s. c. 46 N. E. Rep. 1022). A large number of the earlier cases wherein the question of *ultra vires* was considered arose in connection with public or quasi public corporations, or corporations deriving power from express legislative charter. And much of the strictness of application of the doctrine was on the theory that the interests of the public demanded that corporations should not exceed the power granted. In recent years private corporations have multiplied with great rapidity, and the modern tendency of the courts is to relax this old rigid rule, and to treat them as individuals, and to hold them to the same rules of business morality that govern the individual. And it is said: "The law never sustains the defense of *ultra vires* out of regard for the corporation. It does so only where the most persuasive considerations of public policy are involved." *Wright v. Hughes*, 119 Ind. 342 (21 N. E. Rep. 907, 12 Am. St. Rep. 412). "A liberal application of the doctrine is generally approved, and it is held that the plea should not, as a general rule, prevail, whether it is interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong." *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (20 Am. Rep. 504); *Bank v. Dimock*, 24 N. J. Eq. 26; *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550 (51 N. W. Rep. 641, 30 Am. St. Rep. 454; *Lewis v. Association*, 98 Wis. 203 (73 N. W. Rep. 793). Again it is said: "The defense of *ultra vires* is looked upon by the courts with disfavor whenever it is presented for the purpose of avoiding an obligation which the corporation has assumed merely in excess of powers conferred upon it, and not in violation of some express provision of the statute." *Kennedy v. Bank*, 101 Cal. 495 (35 Pac. Rep. 1039, 40 Am. St. Rep. 69).

During the five years intervening between the execution of the contract and his death, Dr. Watts had consci-

entiously performed every obligation he owed the association.

Acting through its board of directors, it had received
4 and used the money he paid. Not until after his
death was any question raised as to the validity of
the contract. But appellant contends that the articles of
incorporation were in themselves notice to him that his con-
tract was not in strict accord with their terms, and that he
was paying smaller assessments than some of the other mem-
bers of the association. As a general proposition, this may
be conceded to be true. But as said in *Insurance Co. v.*
McClelland, 9 Colo. 11 (9 Pac. Rep. 771, 59 Am. Rep. 134),
"This constructive notice is of a very vague and shadowy
character." It is not claimed that Watts had any actual
knowledge of the articles of incorporation, and it is hardly
to be presumed that he would keep paying assessments and
dues upon a contract that he understood to be of no validity.
Again, it is the duty of stockholders or members of a corpora-
tion to know what their own officers or managers are doing,
and how they are and have been conducting the business of
the corporation; and, if Watts is to be charged with notice
as claimed, it is but fair that his co-members shall be held
to have had full knowledge of the contract with him, and his
to have had full knowledge of the contract with him, and his

Without extending this opinion to greater length, in a
general discussion of the questions presented, we reach the
conclusion, and so hold, that the contract of reinsurance
in question was fully executed on the part of Dr. Watts,
and that the defendant, having received and accepted from
him all dues and assessments he was called upon to pay, can-
not now be heard to say that the contract was *ultra vires*.
This rule, we believe, is founded upon just and equitable
principles, and is sustained by the great weight of modern
authority. It surely works no hardship upon the defendant
or its members, while a different one would permit cor-
porations to accept all the benefits arising from a contract
of this kind and then escape liability because its duly author-

ized officers had, while acting within the general scope of their authority, in some minor matters exceeded it. See notes in *Re Mutual Guaranty Fire Ins. Co.*, 107 Iowa, 143 (70 Am. St. Rep. 155). The judgment of the district court is AFFIRMED.

JOHN WOOD v. M. F. ALLEN, Appellant.

Evidence: USAGE OF TRADE LOCALLY. It is error to exclude evidence that the term "dry goods" used in a written contract, bears a meaning, according to the usage of the locality and among business men and merchants in the community in which the stock was

- 1 located, under which notions, clothing, hats and caps are excluded, since such evidence does not contradict the terms of the contract, but merely applies them to its subject-matter.

CURING ERROR BY CHARGE. A charge that "dry goods" meant in a commercial sense, textile fabrics, cottons, woolens, linens, silks,

- 1 laces, etc., that textile fabrics are those woven, as carpets, or capable of being formed by weaving, and that a "textile"
- 2 fabric is one made by weaving, does not cure the error of excluding evidence that "dry goods" excluded caps, clothing and the like. The jury could not say with certainty whether, under the charge, clothing and caps made of woolen goods should or should not be included in "dry goods."

BY WITHDRAWAL OF ISSUE. The withdrawal of an issue of fraud and false representations inducing a sale, from the jury, cures any

- 3 errors occurring in the prior admission of evidence adduced to sustain such issue and, in the absence of request, the court need do no more than to withdraw the issue.

Understanding of Parties to Contract: It is proper to instruct that, if the parties intend the terms of a written contract to be taken in a sense different from their ordinary one, that sense is to

- 4 prevail against either party, in which he had reason to suppose the other understood its terms.

CONSTRUCTION: *When court interprets.* A written contract provided for the sale of a stock of merchandise, except dry goods and men's overcoats. An invoice was made by certain selected persons. *Held* that, in the absence of a provision making the decision of the invoicers as to what articles the term "dry goods" included final, the court was authorized to determine what articles were included in that term.

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122	292
111	97
e133	79

Appeal from Appanoose District Court.—HON. T. M. FEE,
Judge.

FRIDAY, APRIL 13, 1900.

ACTION at law, in which plaintiff seeks to recover the sum paid by him to defendant, on a contract which, it is claimed, plaintiff rescinded because of the fraud of defendant. Issue was tendered, and the case tried to a jury, resulting in a verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

Mabry & Payne and *C. R. Porter* for appellant.

C. F. Howell for appellee.

DEEMER, J.—Plaintiff and defendant entered into a contract whereby the defendant agreed to sell to plaintiff his entire stock of merchandise in the town of Jerome, excepting only the dry goods and men's overcoats. After the contract was executed, an invoice was taken of the goods, which amounted to something over two thousand dollars. As the invoice amounted to more than plaintiff anticipated, a controversy arose between the parties with reference to some of the goods included in the invoice; plaintiff insisting that they were dry goods, while defendant contended that they were not. As neither would recede, plaintiff finally tendered performance by offering to take what he deemed were dry goods, amounting to six hundred and sixty-eight dollars. Defendant refused the offer, and plaintiff then gave notice of rescission, and commenced action to recover the three hundred dollars he had paid on the purchase price. The case turns largely on the proper construction of these words, found in the contract between the parties, "excepting from said stock of merchandise only that part consisting of dry goods and men's overcoats." Plaintiff claims that, before entering into the contract with the defendant, defendant pointed out to plaintiff the goods that were to be sold; that, with the exception of boots and shoes, they were all on the

east side of defendant's store where the grocery stock was kept; and that defendant stated there would be no trouble in having an understanding about what were included in the term "dry goods," as everything on the west side was dry goods, except boots and shoes; "in fact, everything that had a thread in it." In another building defendant had some goods stored, consisting, among other things, of ladies straw hats and other articles, that were invoiced by the persons who were selected for that purpose as a part of the stock that plaintiff had purchased. When the invoice was taken, many items were included that were found in the western part of the store, and a great many articles that were in the other storeroom, that plaintiff claims were not included in his contract. The dispute then arose which finally led to this litigation. By the terms of the contract, which was in writing, defendant sold to plaintiff his entire stock of general merchandise, now situated and located in the town of Jerome, with the exception heretofore stated. Defendant claims that he did not tell plaintiff what "dry goods" were, or what should be included in the contract. He says the contract was drawn by a third party at the request of both the signers; that plaintiff read it over, seemed to be content therewith, and signed it. At the trial defendant offered witnesses to

1 prove what the term "dry goods" meant to merchants and business men in the community where the stock was located. He proposed to prove that "dry goods" meant shelf goods, bolt goods, dress goods, calicos, and flannels,—in other words, all piece goods,—and that notions, clothing, hats, and caps were not included in that term, according to the ordinary usages of the community. Objections to these questions were sustained, on the ground that answers thereto would tend to contradict and vary the terms of a written contract, and that it was for the court to determine from the language of the contract what was and what was not included in the terms used by the parties. These rulings were manifestly erroneous. In the construction of mercantile contracts,

parol evidence is admissible to show that terms used therein have acquired, by the custom of the locality or by the usage of trade, a peculiar significance; and this is true, although the terms used do not in themselves appear to be ambiguous. Such evidence does not contradict the terms of the contract, but simply applies them to the subject-matter. *Walls v. Bailey*, 49 N. Y. 464. Thus, evidence as to custom and usage has been admitted to explain the words: "Fur." *Astor v. Insurance Co.*, 7 Cow. 202; "roots," *Coit v. Insurance Co.*, 7 Johns. 385; "barrels," *Miller v. Stevens*, 100 Mass. 518; "C. O. D.," *Collender v. Dinsmore*, 55 N. Y. 200; "screened coal," *Manufacturing Co. v. McKee's Adm'r*, 77 Pa. St. 170; "1,000 shingles," *Soutier v. Kellerman*, 18 Mo. 509; "thousand feet," *Brown v. Brooks*, 25 Pa. St. 210; "fancy goods, and Yankee notion store," *Barnum v. Insurance Co.*, 97 N. Y. 188; "product," *Stewart v. Smith*, 28 Ill. 397; "outstanding accounts," *McClusky v. Klosterman*, 20 Or. 108 (25 Pac. Rep. 366, 10 L. R. A. 785); "furniture and fixtures," *Brody v. Chittenden*, 106 Iowa, 524; "top buggies with poles," *Manufacturing Co. v. Randall*, 62 Iowa.

2 245. The court instructed that the term "dry goods," in a commercial sense, meant textile fabrics, cottons, woolens, linens, silks, laces, etc.; that textile fabrics are those fabrics woven, as carpets, or capable of being woven or formed by weaving; and that the term or noun "textile" is a fabric which is woven or may be woven,—a fabric made by weaving. This, no doubt, is the definition given in the dictionaries, but, as we have seen, custom of the locality or the usages of trade may be shown to give them a different significance. Defendant was entitled to show this usage and custom, as a part of his defense. Plaintiff was permitted to give in evidence the conversation and acts of the parties at and about the time of the making of the contract, as well as subsequent thereto, to show what meaning the parties attached to the term "dry goods," and was also allowed to show the practical interpretation placed on the

contract by the parties themselves. But as defendant denied much, if not all, of this evidence, it was for the jury to determine the truthfulness thereof.

Defendant's right to have his theory of the case presented was unduly abridged. But it is contended that the ruling was without prejudice, in view of the court's instruction. Under this instruction, it is difficult to say whether or not clothing and caps, that may have been made of woolen goods, were included in the term "dry goods." The custom or usage of the trade would have shed much light on this matter, and without such evidence the jury had no certain guide by which to determine the issues.

II. The petition also alleged fraud and false representations on the part of defendant inducing the sale. Evidence was admitted to establish this claim, but the court finally held that there was not sufficient to go to the jury, and in its instructions withdrew this issue from the case. Complaint is now made of the rulings on evidence adduced to
3 sustain the claim. These complaints are without merit. Plaintiff was entitled to offer his evidence to sustain the issue, and, when the court finally took that issue from the jury, he was not, in the absence of request, required to do more.

III. The court instructed, in effect, that, if the terms of the agreement were intended in a different sense by the parties to it, that sense was to prevail against either party in which he had reason to suppose the other under
4 stood it. The instruction was clearly correct. *Wood v. Duval*, 100 Iowa, 724; *Chicago Lumber Co. v. Tibble's Mfg. Co.*, 80 Iowa, 369; *Ditson v. Ditson*, 85 Iowa, 276.

IV. Appellant further claims that the decision of the parties selected to make the invoice was controlling, and that the court had no authority to reinvestigate the matter.
5 There is no provision in the contract making the decision of the invoicers final or controlling, and the

court was not deprived of its jurisdiction to determine the issue presented.

V. Some other matters are complained of, but as they are disposed of by what has already been said, or are not likely to arise on a re-trial, we do not consider them. For the error pointed out, the judgment is REVERSED.

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143	732

LAURA SAUNDERS, Appellant, v. THE CITY OF FORT MADISON.

Municipal Corporations: NEGLIGENCE OF FIREMEN: *Respondant superior.* While driving along the street of defendant city, plaintiff's horse, being frightened by the employes of defendant's fire department, who were handling the city's fire apparatus and wantonly ringing a bell attached to it, ran off, injuring plaintiff, who sued to recover for her injuries. *Held*, that there could be no recovery, as the employes were public officers engaged in a public duty at the time of the accident.

Appeal from Keokuk Superior Court.—HON. RICE H. BELL, Judge.

FRIDAY, APRIL 13, 1900.

ACTION at law for damages due, as is alleged, to defendant's negligence in operating or caring for its fire apparatus. A demurer to the petition was sustained, and plaintiff appeals.—*Affirmed.*

T. B. Snyder and B. J. Wellman for appellant.

E. C. Weber and Watson & Weber for appellee.

DEEMER, J.—The petition alleges, in substance, that while plaintiff was driving along and over one of the streets in defendant city, and when opposite a fire station, its agents and servants, while in the line of their employment, and handling the fire apparatus of the city, negligently, carelessly, and wantonly caused the bell attached to said ap-

paratus to be rung, thus frightening the horse that plaintiff was driving, causing him to run away and throw plaintiff from the vehicle in which she was riding, resulting in serious injury to her person; that these agents and servants, after noticing that plaintiff's horse had become frightened, continued to ring the bell, and refused to desist, although requested by plaintiff to do so. Defendant's demurrer was on the grounds that it is not liable for the action of its agents, servants, or firemen who have control of the fire apparatus, and that in no event is it liable for the willful and malicious acts of its agents or servants while handling fire apparatus. This demurrer was sustained, and the question for solution is, is defendant liable for the negligent or careless acts of its agents and servants acting in the line of their duty in caring for the fire apparatus? The doctrine of *respondeat superior* is not applicable to the acts or negligence of all agents and servants of a municipal corporation. Such a corporation, no doubt, has power to purchase and own fire apparatus, and may in some instances appoint the agents who are to manage and care for the same; but it is not, as a general rule, liable for the negligence or carelessness of such agents; for the reason that the service performed is one in which it has no particular interest, and from which it derives no special benefit in its corporate capacity. Such employees are not agents and servants of the city, but act as officers charged with a public service, for whose negligence no action will lie against the city. Where the powers conferred are governmental in nature, the city cannot be made liable for the execution thereof. *Ogg v. City of Lansing*, 35 Iowa, 495; *Calwell v. City of Boone*, 51 Iowa, 687. In the absence of express statute, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair fire apparatus owned by them, than in the care of public buildings. *Hafford v. City of New Bedford*, 16 Gray, 297; *Eastman v. Meredith*, 36 N. H. 284. In *Burrill v. Augusta*, 78 Me. 118 (3 Atl. Rep. 177),

it appeared that the officers of the fire department carelessly and negligently left a fire engine standing within the limits of a public street in the defendant city, and, while so standing, drew the fire, and permitted the steam to escape with great noise, whereby plaintiff's horse was frightened and ran away, and plaintiff was thrown to the ground and injured. It was held that she could not recover, on the theory that these officers were performing a public duty, acting on their own responsibility, and that they were not officers and agents of the municipality, in such sense as that defendant was responsible for their acts. *Dodge v. Granger*, 17 R. I. 664 (24 Atl. Rep. 100, 15 L. R. A. 781), is another case directly in point. There the members of the fire department left a ladder truck standing so that a ladder projected across the sidewalk in front of an engine house, in consequence of which a passer-by was injured. The city was held not liable, because the members of the fire department were public officers for whose acts the city was not liable. It was also held that it was the duty of the fire department to take care of its apparatus and keep it in proper condition for use, and that in doing this work it was performing the same duty as when actually engaged in extinguishing fires. Liability of the city for unnecessarily obstructing the street was conceded, but the case did not show any negligence in this respect. *Wild v. Paterson*, 47 N. J. Law, 406 (1 Atl. Rep. 490), and *Welsh v. Village of Rutland*, 56 Vt. 228, also involved liability of the city for the negligence of its officers and agents in keeping fire apparatus in good condition and repair; and in each case the city was held not liable for injuries growing out of their negligence in this respect. Negligence of a fireman in opening a door of an engine house so as to strike a passer-by on the sidewalk does not render the city liable. *Kies v. City of Erie*, 135 Pa. St. 144 (19 Atl. Rep. 942). Acts of a voluntary association of firemen are to be regarded like those of paid firemen, in respect to the liability of a city. *Torbush v. City of Norwich*, 38 Conn. 225 (9 Am. Rep.

395). The following cases also add support to our conclusions: *Smith v. City of Rochester*, 76 N. Y. 507; *Thomas v. City of Findlay*, 6 Ohio Cir. Ct. R. 241; *Gillespie v. City of Lincoln*, 35 Neb. 34 (52 N. W. Rep. 811, 16 L. R. A. 349); *Pettingell v. City of Chelsea*, 161 Mass. 368 (37 N. E. Rep. 380, 24 L. R. A. 427). The Nebraska case is quite in point, and, following the general tenor of the authorities, it holds that a city is not liable where the injury complained of is due to the negligence of the driver of a ladder truck while exercising a team of horses belonging to the fire department of the city. The demurrer was properly sustained, and the judgment is AFFIRMED.

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119	429

FRANC W. ALTMAN *et al.* v. CITY OF DUBUQUE and H. B. GNIFFKE, CITY TREASURER, Appellants.

Ordinances: IMPLIED REPEAL BY STATUTE. Revised Ordinances Dubuque, chapter 31, declares the manner in which the streets may be improved as authorized by its special charter. Acts Twenty-second General Assembly, chapter 20, 14, makes the provisions

- 1 of Acts Twentieth General Assembly, chapter 20, declaring the manner in which streets of cities of the first class shall be
- 2 improved, applicable to cities organized under special charter, and section 2 provides that nothing contained therein shall
- 3 repeal any law in existence granting authority to cities under special charter, but that existing laws shall be deemed cumulative. *Held*, that since the authority of the city of Dubuque to improve its street was derived from its special charter, and the authority to exercise it in a particular manner was derived from the ordinance, the improvements of streets in such city under such ordinance, before the adoption of an ordinance to carry into effect the provisions of Acts Twenty-second General Assembly, chapter 14, was valid, though a different conclusion might have been reached were it not for said section 2 of said act of the Twenty-second General Assembly.

APPROVAL BY MAYOR ESSENTIAL. Revised Ordinances Dubuque, chapter 31, requires that all street improvements shall be by resolution of the city council. Acts Twentieth General Assembly, chapter 192, requires that a mayor of a city of the first and second class shall sign or veto and return resolutions passed

by the city council before the same shall take effect or be in force, and Acts Twenty-second General Assembly, chapter 2, 4 makes such provisions applicable to cities organized under special charter. *Held*, that such ordinance was mandatory, and hence, where a mayor of such city organized under special charter failed to sign or veto and return to the city council for further action a resolution authorizing street improvements, the city had no power to make the same, and assess a special tax for the payment thereof.

Mayor elected after his predecessor has failed to approve ordinance.

The city council had no power to authorize or direct a mayor subsequently elected to sign such ordinance after the term of office of the mayor in office at the time the ordinance was enacted had expired.

Appeal from Dubuque District Court.—HON. J. L. HUSTED, Judge.

FRIDAY, APRIL 13, 1900.

FRANC W. ALTMAN and twenty others, owners in severalty, of lots and parts of lots abutting on Grandview avenue in said city, bring this action in equity to cancel and discharge as against them and their respective lots a certain special tax levied to pay for paving said avenue, and to perpetually enjoin the collection of said tax. As grounds for said relief they allege a want of authority in the city to make said improvement, and a disregard of the law in many particulars, only some of which are now urged, and which alone require consideration. It is sufficient to say of the answer that it puts in issue the material allegation of the petition. Decree was rendered granting the relief prayed. Defendants appeal.—*Affirmed*.

Duff & Maguire for appellants.

D. E. Lyon and Henderson, Hurd, Lenehan & Kiesel for appellees.

GIVEN, J.—The city of Dubuque exists under a special charter, which gives it control over its streets. Chapter 31

of its Revised Ordinances, in force since 1888, provided for improving the streets, etc., specifying in detail the manner in which the city should proceed. On March 2, 1891, the city council, acting under authority of this ordinance, adopted a resolution as follows: "Resolved by the city council of the city of Dubuque: That Grandview avenue, between Delhi and South Dodge streets, be graded and macadamized in center 40 feet as per plan recommended by the street committee, in conformity with the ordinance upon that subject. That the city engineer be, and he is hereby, directed to make the necessary plans and specifications for said improvement, and the city recorder directed to give the proper notice for bids and proposals for the performance of the work; the macadamizing to be done at the expense of the owners of the abutting property, including the Key City Electric Railway Company. Grading to be bid in total. I. S. Cleminson. Approved Sept. 30, 1897. T. T. Duffy, Mayor." Notice to contractors was published in the *Dubuque Daily Telegraph* on the 1st day of April, 1891, "that proposals would be received until 4 o'clock p. m. of Saturday, Apr. 4, 1891." A bid, accompanied with a bond, was received from Con Ryan, Jr., proposing to furnish all the materials and do all the work "according to the foregoing plans and specifications. Grading in total, \$6,700. Macadamizing per sq. yd. 54 cents." On the 9th day of April, 1891, Con Ryan, Jr., and R. W. Stewart, mayor, entered into a written contract for the making of said improvement "according to the plans and specifications prepared by M. Tschirgi, Jr., City Engineer, of said city, and now on file in the office of the city recorder," which were made part of the contract. Con Ryan, Jr., gave bond for the performance of the contract. The specifications referred to were approved by the city engineer and committee on streets March 10, 1891. They require that the avenue "shall be brought to the proper grade lines as directed by the city engineer," and that bidders "include in price for macadam the cost of rolling

same by the city at 5 cents per sq. yd." They further required as follows: "The macadamizing shall consist of: (1) A bed of macadam broken to pass through a four (4) inch ring; to be eight inches deep at the center of the street, and four inches deep at the edge next to the gutters; to be smoothly rounded to the shape of the street as per plan and sec. in the office of the city engineer, said plan and sec. making a part of these specifications. This part of the work shall be subject to examination by the committee on streets and engineer before proceeding with the work. (2) A bed of macadam broken to pass through a two (2) inch ring; to be 7 in. deep at the center of the street, and 5 in. deep at the edge next to the gutters; to be smoothly rounded to the shape of the street according to the above specified sec. In this bed no thin layer soft quarry rock will be allowed. After the work has been approved by the committee on streets and engineer, it shall be thoroughly rolled, then covered with one inch of gravel and thoroughly rolled in as before. Stone for sec. course of macadam to consist of the best hard limestone, subject to the approval of engineer, and must be broken to proper size before hauling onto the street." The contract also provided that the improvement be completed on or before the fifteenth day of August, 1891, "to be subjected to the inspection and rejection of the committee on streets and the city engineer. Mr. Ryan proceeded to make the improvement, but whether as required by the contract and specifications is in issue. The city caused notice to be served September 28, 1891, on plaintiffs and others to appear on October 5, 1891, to show cause why a special assessment should not be made against their property to pay for said improvement. On November 2, 1891, the city council adopted an ordinance (chapter 32) entitled as follows: "An ordinance to provide for giving effect to the provisions of chap. fourteen (14) of the acts of the Twenty-third G. A. of the state of Iowa, and making provision with respect to contracts for paving and curbing streets, and the

construction of sewers, the collection of assessments, and the issuance of bonds or certificates by the city of Dubuque to pay for such improvements." On the same day—November 2, 1891—the council passed a resolution assessing a special tax in amounts specified on the properties of plaintiffs and others, to pay for said improvement, of which notice was published November 25, 1891. On November 18, 1891, the council passed a resolution allowing said special tax to be paid in seven installments, as provided by ordinance. On the same day a resolution was passed authorizing the mayor to issue bonds of the denomination of five hundred dollars each under the ordinance adopted November 2, 1891, for the purpose of providing for the payment of the costs and expenses of improving the streets specified, including Grandview avenue, which costs and expenses aggregated forty-six thousand dollars. No effort appears to have been made to collect the tax in question until November 30, 1896, when the city treasurer gave notice for the sale of the properties for the payment of the tax, "as provided by resolutions and ordinances of the city of Dubuque." The bonds mentioned above were issued, and have since been paid out of money collected by special assessment; the bonds for the improvement of Grandview avenue being paid out of assessments collected on other streets, but all out of the special assessment fund. The bonds did not recite the improvement of a particular street, but all of the fifteen streets that were improved under similar arrangements. This abbreviated statement of the action of the city is sufficient, we think, for an understanding of the matters to be considered. On December 22, 1896, this action was commenced to cancel said tax, and enjoin its collection, for reasons which we will now consider.

II. Plaintiff's first contention is that the city was without authority to make this improvement at their expense, for the reason that said chapter 31 of the Revised Ordinances was not in force at the time said proceedings were had. It is claimed that chapter 14, Acts Twenty-second General

Assembly, approved April 10, 1888, making chapter 20, Acts Twentieth General Assembly applicable to cities existing under special charter, had the effect to repeal said ordinance. Section 2 of said chapter 14 is as follows: "That nothing in section one of this act shall be construed or considered as repealing any law now in existence granting authority to any cities incorporated under special charter, but whatever authority upon any of the subjects in the foregoing law is now in existence shall be deemed cumulative to the provisions of said section one hereof. Approved April 10, 1888." Said chapter 20, Acts Twentieth General Assembly, and said chapter 31, Rev. Ord., treat of the same subject, and in many respects in a similar manner. Therefore, if it were not for said section 2 quoted above, it might be said that, when said chapter 20 was made applicable to the city of Dubuque, it had the effect of repealing said ordinance, but not so in view of said section 2. The evident purpose was to retain in force all laws granting authority to cities under special charter. The general authority of this city was derived from its special charter, but the authority to exercise it in a particular manner was derived from the ordinance. We conclude that chapter 31, Revised Ordinances remained in force until the adoption of said ordinance chapter 32, approved November 2, 1891, "An ordinance to provide for giving effect to the provisions of chapter 14." It follows from this conclusion that the city had power to proceed when it did, under said chapter 31, Revised Ordinances, to make this improvement.

III. The plaintiffs, assuming that the city proceeded under said chapter 20, Acts Twentieth General Assembly, and chapter 14, Acts Twenty-second General Assembly, point out several particulars wherein it is claimed the proceeding was not in accordance with said statute; but, as we hold that the proceeding was under said ordinances, we need only inquire whether it was in conformity with the ordinances. Under section 3 of said chapter 31, Revised

Ordinances, it was required that notice be given to bidders "by an advertisement of at least 5 days in the official papers of the city." The notice given was published with the proceedings of the council, and therefore, we may presume, in the official papers of the city; but it was published for four, instead of five days. In the view we take of the case, we need not determine whether this renders the proceedings illegal. It is also contended by the plaintiffs, either that there never has been an established grade upon the portions of Grandview avenue improved, or that, by the action of the council in establishing a grade, it changed the grade without making compensation to abutting owners for damages. We are inclined to hold from the evidence that there had been no previously established grade; therefore no change of grade in the making of this improvement.

IV. The resolution passed March 2, 1891, authorizing this improvement, was not signed by the then mayor of the city, Mr. R. W. Stewart, nor was it returned by him with objections, nor passed over his objections. September 30, 1897, more than six years after its passage, the city council passed a resolution ordering and directing the then
4 mayor, Mr. T. T. Duffy, to sign said resolution, and thereupon he wrote thereon: "Approved Sept. 30, 1897. T. T. Duffy, Mayor." Chapter 192 of the Twentieth General Assembly, then in force, provided: "That the mayor of every city * * * shall sign every ordinance and resolution passed by any city of the first or second class before such ordinance or resolution shall take effect or be in force." Further provisions were made for a mayor's returning the ordinance or resolution with his objections, and for passing the same over his objections, but there was no provision for its taking effect if not returned, as found in section 15, article 3, of the constitution, in relation to bills passed by the general assembly, nor as provided in section 685 of the present Code as to ordinances and resolutions. Chapter 2, Acts Twenty-second General Assembly, made

these provisions applicable to cities organized under special charters. It is certainly clear that under the law as it then stood ordinances and resolutions only took effect when signed by the mayor or passed over his veto. In *Stutsman v. McVicar*, 111 Iowa, 40, the mayor had returned the resolution with his objections, and, it not being passed over his objections, we held that the resolution was not in force. In *Heins v. Lincoln*, 102 Iowa, 69, we held this requirement that the mayor sign resolutions of the city council before they shall take effect to be mandatory. It is the approval by his signature, or disapproval, with his reasons, by the mayor presiding, that is contemplated, and not the approval or disapproval of one who may succeed him in office. Therefore, the council had no power to authorize Mayor Duffy to approve said resolution; much less to order and direct him to do so. Defendant's counsel insist in argument that to hold that this resolution did not take effect for want of the signature of the mayor would be to put it in the power of the mayor, as the law then stood, to defeat legislation by withholding ordinances or resolutions that had been passed. It is insisted that the change made by the present Code indicates that it was intended by the former law that a resolution or ordinance not approved or returned with disapproval within fourteen days should go into effect. We think the change indicates a different construction of the former law. It is argued that, as more than fourteen days had elapsed between the passage of said resolution for the commencement of the work and the advertisements for bids, the resolution was then in force; but, as we have

5 said, it could not be in force, under the law as it then stood, unless signed by the mayor, or passed over his veto. Said chapter 31, Revised Ordinances, requires that an order for such improvements should be by resolution, which requirement, we have seen, was mandatory, and without it the city could not proceed to make the improvement. The resolution acted upon in this case never took effect, and there-

fore the city council was without authority to proceed in the matter as they did. This conclusion renders it unnecessary that we consider other claims of the plaintiffs, and it follows that the judgment must be AFFIRMED.

CHARLES SCHROPE v. TRUSTEES OF PIONEER TOWNSHIP AND
PRIOR FAIRLY, Supervisor, and ORA B. BAUGHMAN,
Appellants.

111	113
127	553
111	113
129	471

Drainage: DIVERSION OF FLOW: *Injunctions.* Where a culvert for the drainage of water did not increase the quantity of water on plaintiff's land, or throw it thereon in a different manner than the same would naturally have flowed on it, a petition to enjoin should be dismissed.

Appeal from Cedar District Court.—HON. WILLIAM G. THOMPSON, Judge.

FRIDAY, APRIL 13, 1900.

THE plaintiff's land is north, and that of defendant Baughman south, of a public highway. The road had been graded somewhat, and a tile culvert put in for the passage of water. It is claimed that surface water gathers in a pond on defendants' land, and runs through the culvert on that of plaintiff to his damage. A writ of injunction restraining the continuance of the culvert, was granted, unless defendants put in a tile drain connecting with that of plaintiff. Defendants appeal.—*Reversed.*

W. G. W. Geiger and *R. R. Leech* for appellants.

W. H. Smith and *Chas. W. Kepler* for appellee.

LADD, J.—If the culvert in question increased the quantity of water on plaintiff's land, or threw it thereon in a different manner from what the same would naturally have

flowed upon it, to his injury, he might have cause to complain. *Livingston v. McDonald*, 21 Iowa, 174; *Willitts v. Railway Co.*, 88 Iowa, 281, 21 L. R. A. 608; *Dorr v. Simer-son*, 73 Iowa, 89. But there is not a particle of evidence in the record tending to show this. The road is through a depression, and surface water naturally gathered in ponds on both sides, though somewhat deeper on plaintiff's land, as it is lower than Baughman's, and the surplus of water drained to the eastward from the pond on the land of the former. This culvert through the road embankment had been maintained for some fifteen years, and, up to the time plaintiff tiled his land, had had no effect on the natural flow of the water. But as the tiling now drains the water from the depression north of the road, that which would stand on defendant's farm to the south but for the tiling, in seeking the lowest level, flows through this culvert and settles in the lowest part of the drained land. Some witnesses speak of ditches, but none claim these increased or changed the flow of the water. The complaint then is not of anything done by the defendants, but of their omission to do something to obviate their enjoyment of the benefits incidentally derived from the plaintiff's drainage. For all that appears, the water would settle on his farm precisely as it does now were the embankment and culvert removed, and the ground as nature left it. The change was brought about by the plaintiff, and we are aware of no rule of law requiring a road supervisor to so alter the construction of the public highway as to prevent the natural flow of surface water induced by the draining of land on either side. Such improvements are necessarily made with reference to existing conditions, and if, as a result, water, because of the laws of gravitation, settles where otherwise it would not, the proprietor has no legal right to the aid of his neighbor in repelling it. There was no illegal act committed or threatened, or legal duty omitted, on the part of any of the defendants, and for this reason the petition should have been dismissed.—REVERSED.

C. M. NORRIS, Appellant, v. D. R. TRIPP, Sheriff, and D. S. MORGAN & Co.; C. M. NORRIS, Appellant, v. D. R. TRIPP, Sheriff, and S. W. COBB & Co., and C. M. NORRIS, Appellant, v. D. R. TRIPP, Sheriff, and JAMES ELLIOTT.

111	115
114	28
111	115
126	553
111	115
129	158

Limitation of Actions: SUCCESSIVE STATUTES: *Judgment.* The Revision of 1860 barred judgments in twenty years after rendition. While it was in force a debt was made which ripened into judgment after the enactment of the Code of 1873. This fixed the limitation of actions on judgments at twenty years after fifteen years next following their rendition, and section 50 provided that the act should not affect any act done, any right, or suit had or commenced before the act took effect, but such proceedings should be conformed to its provisions as far as consistent. *Held*, that the rights referred to were those arising from obligations, not such as pertain exclusively to remedies, and hence the limitation enacted by the Code of 1873 governed this judgment.

SAME. The legislature may not bar instant a suit on an existing cause of action, but must give a reasonable time within which to prosecute the same under the new statute; hence Code, 1897, fixing a limitation of twenty years for actions on judgments, cannot apply to a judgment rendered in 1877, since it would wholly prevent action thereon.

Supersedeas Pending Appeal: *Authority of justice of supreme court.* An order restraining a proceeding to collect a judgment, pending an appeal, upon the filing of a bond, was properly made by one of the judges of the Supreme Court, where, without the order, the objects of the appeal would be defeated, though the statute provides for no such order.

Appeal from Jasper District Court.—HON. JOHN T. SCOTT, Judge.

SATURDAY, APRIL 14, 1900.

PLAINTIFF, a judgment defendant in three judgments, brings these actions against the sheriff and the other defend-

ants named, plaintiffs in said judgments, to enjoin the sale of real estate on executions issued on said judgments, on the ground that the judgments were barred by the statute before the executions were issued: Defendants resisted, claiming that the matters stated in the petition do not entitle the plaintiff to the relief demanded. Applications were made in each case to Honorable John T. Scott, judge, in vacation, for temporary writs and submitted on the verified petitions and the resistances thereto. The applications were denied, and plaintiff appeals.—*Affirmed.*

Harrah & Myers for appellant.

W. O. McElroy and *F. H. Clements* for appellees.

GIVEN, J.—As these cases involve the same question, they are argued and submitted together, and will be so disposed of. The petitions show: That judgments were rendered in the circuit court of Jasper county, Iowa, against the plaintiff as follows: One in favor of D. S. Morgan & Co. March 20, 1877; one in favor of S. W. Cobb & Co., March 20, 1877; and one in favor of James H. Elliott, January 19, 1877. That executions were issued on each of said judgments on the eleventh day of August, 1899, and delivered to the defendant Tripp, sheriff, and that he levied the same upon certain lands belonging to this plaintiff, and was about to sell the same under said execution. The petitions also show that the plaintiff has been continuously a resident of Jasper county for more than thirty years last past, and that there has been no revivor of any of said judgments or of the debts for which they were rendered. It is alleged that the indebtedness for which these judgments were rendered was contracted prior to the enactment and taking effect of the Code of 1873. In the case against S. W. Cobb & Co. allegations are made showing a want of consideration for the indebtedness upon which that judgment

was rendered, but the judgment being conclusive as to such matters, they cannot now be considered. It will be
1 seen from what we have said that over twenty-two years elapsed between the rendition of each of these judgments and the issuing of the execution thereon, and that nothing had occurred to stop the running of the statute of limitations as against the judgments.

II. Out of these facts we have the single question whether these judgments were barred at the time the executions were issued. To solve this, we must first ascertain what the limitation is. If it was as fixed by the
2 Revision of 1860, in force when the debts were contracted, it was twenty years after the rendition of the judgments; if as fixed by the Code of 1873, as construed in *Weiser v. McDowell*, 93 Iowa, 772, it was twenty years from the expiration of fifteen years next following the rendition of the judgments; and if as fixed by the present Code, it is twenty years from the rendition of the judgments. There is no dispute but that such are the limitations provided in said statutes; the contention is as to which applies to these cases. Section 50 of the Code of 1873, in relation to the repeal of former statutes, provides as follows: "Sec. 50. The repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of this Code as far as consistent." Plaintiff contends that the rights under these contracts of indebtedness were rights accruing when the Code of 1873 went into effect; that the limitations pertaining thereto and to judgments thereon were part of such rights, and that said rights are expressly reserved from the operation of the repeal, and left to be governed by the former statute. Defendants contend that rights as to the limitation of actions upon said judgments were not accruing nor accrued rights at the time the Code

of 1873 took effect, and that, said judgments having been rendered under that Code, the limitation therein provided applies, not the limitation provided in the Revision of 1860. "It is a fundamental principle recognized by this and other courts that the statute of limitations pertains to the remedy only, and not to the essence or merits of an obligation." *Weiser v. McDowell*, *supra*, and cases cited. The rights referred to in said section 50 are those arising upon the contracts, not such as pertain exclusively to the remedy. "It is undoubtedly within the statutory power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exercise of this power is, of course, sub-

3 ject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect." *Koshkonong v. Burton*, 104 U. S. 668 (26 L. Ed. 886); 15 Am. & Eng. Enc. Law, 695, 696, and notes. The limitation under consideration

4 is not as to the contracts of indebtedness, but as to the judgments thereon. "Every judgment is, as a general rule, to be regarded as a new debt, not in any way affected by the character of the old one, * * * and, when the court is called upon to enforce it, no inquiry will be made concerning the facts preceding the judgment, to ascertain whether the original demand was one which it would have indorsed." 15 Am. & Eng. Enc. Law, 338; Freeman Judgments (3d ed., 517. Plaintiff cites *Cochran v. Taylor*, 13 Ohio St. 382. That was an action on a bond, which the court held to be an accruing right, and reserved by a statute similar to said section 50. If these were actions upon the contract of indebtedness, the case would be in point, but our question is as to the limitation of the judgments. Our con-

clusion is that the limitation provided in the revision of 1860 does not apply to these judgments.

III. Plaintiff's next contention is that, if the revision of 1860 does not apply, the Code of 1897 does, and that by its provisions the judgments are barred. Sections 51 and 3439 of the Code of 1897 are the same as sections 50 and 2521 of the Code of 1873, except that section 3439 provides, in addition, that: "The time during which an action on a judgment is prohibited by this section shall not be excluded in computing the statutory period of limitation for an action thereon." It is urged in argument that, "if the Code of 1873 does not expressly reserve the rights arising under the revision, then with equal equity the Code of 1897 does not expressly reserve rights arising prior thereto, and the Code of 1897 would govern and control herein." The ready answer to this argument is that there were no judgments in these cases to which the revision could apply; there were no accruing nor accrued rights as to the limitations upon these judgments when the Code of 1873 was enacted, but not so when the Code of 1897 went into effect. These judgments were rendered under the Code of 1873, and, as we have seen, the limitation provided in the revision did not apply. Therefore, unless the limitation of the Code of 1873 applies, they were without limitation from the time of their rendition until the time the Code of 1897 took effect. Another ready answer is that, if the Code of 1897 applies, it did so immediately upon its taking effect. In *Kennedy v. City of Des Moines*, 84 Iowa, 189, it is said: "It is a familiar doctrine that it is not competent for the legislature by a statute of limitation to take away all remedies existing upon causes of action, and by this exercise of power the legislature will bar recovery thereon. Such statutes, to accord with constitutional guaranties, must preserve a reasonable time wherein actions may be brought." See, also, *Casady v. Grimmelman*, 108 Iowa, 695. Such is the uniform hold-

ing of all courts. We think the provisions of the Code of 1873 applied at once to these judgments upon their rendition; that, therefore, rights as to their limitation under that statute accrued, and were saved from the operation of the repeal of the Code of 1873. A manifest difference is that no right existed as to the limitation of these judgments when the revision was repealed, while such rights had accrued and were existing when the Code of 1897 took effect. This disposes of the questions involved in the merits of the cases, and leads to the conclusion that the judgment of the district court is correct, and should be AFFIRMED.

Motion to Set Aside Supersedeas.

IV. Pending this appeal, on application by the plaintiff to one of the judges of this court, an order was made restraining the defendants from proceeding further under said executions, pending the appeal, or until otherwise ordered, upon plaintiff's executing a bond in each case in a sum named, conditioned to pay costs and damages if the order was improperly granted. The order expressly preserved to the defendants all rights under their executions and the levies made, and with leave to move the court to set aside those orders or to increase the bonds. The defendants filed their motions to set aside said orders, and in support thereof it is insisted that the making of the orders was not author-

ized by law. There is no provision in the statute
7 for making such orders, but this court has many times held that where, without such order, the objects of the appeal will be defeated, and the rights of the appellant irreparably prejudiced, the court will, in preservation of its own jurisdiction, make such orders. See *Luce v. Fensler*, 85 Iowa, 596, as somewhat in point. It is suggested that the amounts of the bonds required were insufficient, but, if so, this would be remedied by a motion to increase the amount, rather than to dismiss the action. The other grounds of the motion involved the merits of the case, which we have

already considered. There was authority for granting the order, and, so far as appears, the amounts of the bonds were sufficient. As to these points, the motion is OVERRULED.

S. R. SHAMBAUGH V. CURRENT & SANDERSON *et. al.*, Appellants.

111	121
112	602

111	121
118	578

111	121
1134	255

Warranty: ESTOPPEL TO RELY ON BOTH ORAL AND WRITTEN. Where a party does not rely on a written warranty but pleads that the writing was only a part of the contract and that verbal representations were made, he cannot complain that the court treated the language of a written contract for sale of cattle which spoke of them as "thoroughbred," as a mere description of the cattle rather than a warranty that they were thoroughbred. One who attempts to establish oral warranty is in no position to urge that there was a written warranty on the same subject.

Action by Assignee: MAKING ASSIGNOR PARTY: *Where needless.* The defendant, in an action on an account by the assignee thereof, cannot require the assignor to be made a party to the suit, as any defense against the assignor might be made against the assignee.

Evidence: EXCLUSION: *Harmless error.* Refusing to permit witnesses to say whether certain animals were thoroughbred, if neous, is not prejudicial, where the same witnesses gave their opinion on the matter in another form, to-wit, by stating that they were not "thoroughbred" and giving reasons for such an opinion.

SAME. Error in excluding evidence is harmless, where the fact sought to be established is proven by other evidence.

CROSS EXAMINATION: *Latitude.* Under a defense of breach of warranty as to pedigree of cattle sold which were registered in a certain herd book, a wide latitude is proper in the cross examination of defendant as to the authority of such herd book and similar matters, when defendants held official position in the cattle club which published the register, and one of counsel for defendant was its secretary, and when the particular cattle in issue were registered while said counsel owned them.

OPINION EVIDENCE: *As to legal responsibility.* In an action, by the assignee of a seller, for the price of cattle sold, where the defense is breach of warranty that they were thoroughbred, a question asked of defendant as to what the seller said in re-

gard to his responsibility for the calves bred of one of the cows sold is inadmissible for being an opinion as to legal responsibility.

Instructions: REPETITION NEEDLESS. The refusal of an instruction 7 is not error when the instructions given correctly instruct the jury on the same point.

Striking Part of Pleading: HARMLESS ERROR. Striking out one of two 1 divisions of an answer, each setting up a breach of warranty, if erroneous, is not prejudicial.

Appeal from Jackson District Court.—HON. A. J. HOUSE,
Judge.

SATURDAY, APRIL 14, 1900.

ACTION on account for the price of certain cattle sold by one Bohart to defendants. Plaintiff claims as the assignee of Bohart. The defenses were fraud and breach of warranty, the particulars of which will appear in the opinion, so far as necessary to convey an understanding of the points ruled upon. There was a trial to jury, verdict and judgment for plaintiff, and defendants appeal.—*Affirmed.*

Hayes & Schuyler and *Murray & Farr* for appellants.

Ellis & Ellis and *W. C. Gregory* for appellee.

WATERMAN, J.—The court took the issue of fraud from the jury for want of any evidence to establish it. We do not understand that serious complaint is made of this action, nor do we see how it could consistently be questioned, under the evidence.

II. A motion to strike certain portions of the answer was sustained, and error is assigned upon the ruling. The answer was quite lengthy and made up of different divisions, two of which, in varying terms, but with no substantial difference, set up the defense of breach of an oral warranty.

One of these divisions was stricken on this motion,
1 as redundant. If erroneous, this ruling was not
prejudicial; for the matter thus eliminated all ap-

peared in the second division of the answer, which was permitted to stand. Defendants contend they had the right to plead the same defense as many times as they saw fit. We might concede this, but they had a right to prove it

only once, and this they were given an opportunity to
2 do under the answer as it was allowed to stand.

The motion to strike was sustained as to the sixth division of the answer, which claimed that the assignment of the account to plaintiff was not *bona fide*, and asked that Bohart be made a party to the suit. The claim sued on was non-negotiable, and any defense that could have been urged against Bohart was open to defendants as against plaintiff. Appellants confess that they can find no authority directly in point which sustains their contention. This, with the fact that there appears to be no good reason for requiring such action as here asked, is enough to justify the ruling of the trial court. A question quite similar in principle was passed upon by this court in *Kelly v. Insurance Co.*, 82 Iowa, 137. In that case the defendant claimed the policy of insurance upon which plaintiff sued had been assigned to another person, and asked that such third person be brought into the action. The trial court refused the request, and we approved its holding. *Vimont v. Railway Co.*, 64 Iowa, 513, cited by appellants, is against, rather than in support of, the claim made.

III. The warranty relied on consisted in the representation by Bohart that a part of the cattle sold were "thoroughbred" red polled cattle. To show its breach, a number of witnesses were called by defendants, and asked, in substance, to state whether the animals were "thoroughbred." Objections to these questions were sustained,
3 and this, it is claimed, was error. If it was error, the rulings were without prejudice; for in each instance the witness gave his opinion in another form, to the effect that the animal asked about was not "thoroughbred." As an example, the witness Sanderson stated that

the progeny of pure bred, red polled cattle do not develop horns, or slugs, which are abortive horns, and that a calf of the cow Psyche, which was one of the cows sold, did develop such slugs. In a similar manner, each of the witnesses, to whom the questions were addressed which the court ruled out, expressed his opinion that the animal inquired about was not a "thoroughbred," and gave his reason for so thinking.

IV. The cattle sold as thoroughbred were registered in the herd book of the Red Polled Cattle Club of America, of which club J. C. Murray, one of counsel for defendants was secretary, and in which both of the defendants held official positions. Murray once owned the cattle in question.

He sold them to Bohart. They were registered while
4 Murray owned them. On cross-examination, defendant Current was asked a number of questions with relation to the herd book; its authority as to pedigree among dealers, and similar matters. These questions were all objected to and the objections overruled. In view of the facts stated, we think the court was justified in allowing a wide latitude in cross-examination. There was no error in the rulings.

V. This question, referring to Bohart, was asked of the defendant Current: "Did he say anything to you at that time, or was anything said, in regard to his responsibility for these calves, or whether there would be any difference as to the responsibility of the two? and, if so, state what he said or what was said in this regard." The calves

spoken of were from the cow Psyche. If we under-
5 stand this question, it seeks to get what Bohart said as to his legal responsibility,—a matter of pure opinion, and inadmissible. Evidence was introduced by defendants to the effect that plaintiff said that Bohart told him he had returned a bull calf called Cupidity to Murray & Gillan because it developed horns. Defendants then asked

the witness who made this statement, whether Cupidity was a calf of the cow Psyche. This question was ruled
6 out. If the object was to show that Bohart had knowledge of the fact that some of Psyche's calves developed horns, and we can conceive of no other purpose, then this was accomplished, and by this witness, for he swore that he had shown two other calves of Psyche to Bohart, both of which had abortive horns. The instances given will show the character of the rulings of which complaint is made in the one hundred and sixty-seven errors assigned, most of which relate to matters of evidence. We cannot, without unduly lengthening this opinion, consider all these exceptions in detail. Indeed, while each is made the subject of some criticism, it can hardly be said that all are argued. The principles involved in those we have mentioned apply to all others. We have carefully examined each of them, and find no prejudicial error.

VI. The court refused to give an instruction asked by defendants, and this is made ground of exception. The instruction defined a warranty. There was no error in refusing it, for the charge as given correctly informed
7 the jury on the subject. But the instructions given are also made the subject of criticism. There was a written contract of sale, in which the cattle or some of them were mentioned as "thoroughbred." The court held this word to be merely descriptive, and left the jury to
8 find a warranty, if at all, in oral representations made. This is in line with the theory of defendants. They do not rely on a written warranty, but plead that the writing was only a part of the contract, and that verbal representations were made. Both an oral and written warranty could not be established. The former would be merged in the latter. *Davis v. Danforth*, 65 Iowa, 601; *Nichols v. Wyman*, 71 Iowa, 160. Recognizing this, the defendants pleaded an oral warranty made at the time of the sale, and in the testimony introduced they sought to establish it. No-

where in the evidence produced in their behalf is there an intimation that the written warranty was relied upon, though we may say, in order not to be misunderstood, that in one paragraph of their answer the written warranty is set up. It is manifest that this evidence as to an oral warranty was clearly inadmissible on any theory, save the word "thoroughbred" in the writing was merely descriptive of the animals sold and not an affirmation of quality. Under these circumstances, defendants have no right to complain that the trial court took from the jury the issue as to a warranty in the writing.

Defendants do not claim that the general principles of law as to warranty are not accurately stated in the charge of the court, but they seem to insist that this case calls for the application of some special and peculiar rule. We do not discover any such requirement in the facts. There being no substantial error, the judgment will be AFFIRMED.

STEPHEN BRADLEY, Administrator with Will Annexed of
the ESTATE of J. C. HORMEL, Appellant, v. C. E.
CHESEBROUGH AND J. L. GIESLER, Assignees of A. A.
BALL & Co., Appellees.

Banks: INSOLVENCY: Trust funds. An executor deposited some \$3,000 of funds belonging to his estate with a bank in which he was a partner. The assets of the bank were, for a time after the deposit, largely augmented, to which deposits, generally, including this one, contributed. No new loans were made after this deposit, with bank funds, and, after a time, deposits shrank and losses were incurred on overdrafts, largely exceeding said \$3,000 deposit. The bank failed and the assignees received private property of the bankers, some \$450 in cash, said overdraft and bills receivable, largely uncollectable, which were obtained before said deposit was made. *Held*, though there is a presumption that funds received by a bank better its assets, the presumption is rebutted here and that it does not appear the deposit had been preserved and came to the assignees in such form that it can be treated as a preferred trust without

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121	232

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144	84

injury to the rights of general creditors. *Plow Co. v. Lamp*, 80 Iowa, 722, distinguished and criticised.

Evidence: EXTRACTS FROM BANK BOOKS. In an action against the assignees of a bank to impress a trust on funds in their possession, one of the assignees who was bookkeeper of the bank may, in testimony, give statements made up from the books of
3 the bank showing the assets and liabilities and the disposition thereof, when the books from which the statements were taken were present in court, and were not offered in evidence, there being ample opportunity to examine them and to cross examine the witness.

Appeal from Muscatine District Court.—HON. W. F. BRANNAN, Judge.

SATURDAY, APRIL 14, 1900.

SUIT in equity to impress a trust on certain funds in the hands of the defendants, as assignees of a banking partnership known as A. A. Ball & Co., and for judgment for the amount of plaintiff's claim. The trial court denied the relief asked, and plaintiff appeals.—*Affirmed.*

Remley, Ney & Remley for appellant.

Jayne & Hoffman and *Carskaddan & Burk* for appellees.

DEEMER, J.—From an opinion filed by the learned trial judge we extract the follow statement of facts, that we find sustained by the record: "John C. Hormel, the decedent, it
1 appears, died intestate on or about the nineteenth day of April, 1892. He was at the time of his death a resident of Johnson county, Iowa, and A. A. Ball, of the firm of A. A. Ball & Co., bankers at West Liberty, and the active business manager of said firm, was, by the last will of said testator, appointed executor. He accepted the trust, and duly qualified as such executor. The fund which it appears came into his hands, as such executor, was deposited by the executor in the bank of the said A. A. Ball

& Co., and amounted, up to the first of February, 1893, to the sum of three thousand two hundred and eighty-six dollars and seventy-six cents. The defendants claim that at that date the money thus deposited had been paid out in the ordinary course of business by the bank. The balance remaining in the bank to the credit of the estate, according to its books, on the nineteenth of September, 1896, amounted to the sum of three thousand two hundred and eighty-six dollars and seventy-six cents. At the last date it appears that the said firm of A. A. Ball & Co. and its individual members made a general assignment for the benefit of creditors. On the seventh of April, 1897, some months after the assignment, Mr. Ball was by the court removed from his office as executor of said estate, and the plaintiff appointed administrator with the will annexed. On the twenty-sixth day of the same month the plaintiff, as administrator aforesaid, instituted the present proceeding, claiming that, with interest at six per cent., there was due the sum of four thousand two hundred and twenty-one dollars and eighty-nine cents at the time the petition was filed. He alleges that Ball, as executor of said estate, deposited the same sum received by him on account of said estate with the banking firm of A. A. Ball & Co., to the credit of said J. C. Hormel estate, who used the moneys as received in the banking business as their own money, subject only to be drawn from said A. A. Ball & Co. on proper order of court; that the money so received by said Ball, as executor, deposited with the said banking firm, increased, bettered, and improved said estate therewith, and turned over all of said estate so bettered and improved thereby, under their deed of general assignment for the benefit of creditors, to the said Chesebrough and Giesler, who hold the same in their hands under said assignment. The plaintiff further alleges that said A. A. Ball & Co. had actual knowledge of the fact that the money deposited to the credit of the John C. Hormel estate was trust money in the hands of Ball, as executor, and formed a trust fund in the

hands of A. A. Ball & Co., and that with this knowledge Ball & Co. wrongfully converted to their own use money which it was their duty to preserve. The defendants, in answer to the claim of the plaintiff, in substance say that no part of the money thus deposited came into their hands under the deed of assignment, and that none of it exists in any other form in the assets that they received as assignees. There is no dispute as to the fact that the money belonging to the Hormel estate was by A. A. Ball, the executor of said estate, deposited in the bank of A. A. Ball & Co., and by it wrongfully used in the course of its business.

2 The real question, then, is this: Was the said fund or some part of it preserved in some form by the said insolvent banking firm at the date of the assignment? The cash in the bank at that date, that appears to have come into the hands of the assignees, was but a few cents less than four hundred and fifty dollars. There was a very large amount of notes, but these notes represented loans that were improvidently made, and at the date of the assignment were some of them worthless, and others of but little value. The notes on hand, good and bad, and which were delivered to the assignees, amounted in all to the sum of two hundred forty-five thousand eight hundred and one dollars. At the time the case was submitted to the court the gross collections on notes was eighty-seven thousand five hundred and seventy-two dollars, and setoffs allowed against them was seven thousand four hundred and seven dollars and ninety-two cents, leaving as the net amount received by the assignees the sum of eighty thousand ninety-three dollars and forty-eight cents."

In addition thereto, it may be stated that after the receipt of the money, and down to May, 1893, there was a steady increase in the assets of the bank. About the last-named date the historic panic of 1893 came on, and the assets of the bank gradually and surely decreased, until the

bank was forced to make an assignment for the benefit of its creditors. It also appears that at the time the deposit was made which plaintiff seeks to recover there was due from the bank to depositors two hundred ninety-six thousand and seventy-seven dollars and seventy-seven cents. When the assignment was made this amount had been reduced to one hundred eighty thousand six hundred and ten dollars and twenty-five cents. After the beginning of the year 1893, the bank made no new loans, except from money borrowed from other banks. One of the assignees, who was also one of the employes and a bookkeeper of the bank, testified that none of the assets acquired by the bank after June 1, 1893, came into the hands of the assignees, save such as were procured with money borrowed as above stated. This same witness also testified that the bank received notes after the date of the deposit and before the assignment, to the amount of nearly one hundred and eight thousand dollars, that were uncollectible, and he also testified that during the same time the bank allowed overdrafts to the amount of ten thousand five hundred and ninety-three dollars that cannot be collected. During this same period the bank was paying interest on time certificates at the rate of five per cent. The amount of these certificates was something like one hundred and forty-eight thousand dollars. It was also paying the ordinary current running expenses. The same witness to whom we have referred further testified that he was unable to tell, either from memory or from the books of the bank, where the money belonging to the Hormel estate was invested; that it was so mixed with other funds that he was unable to tell where it is, or what debt was paid with it; and that "it may have been invested in notes that we have in our hands as assignees, or it may have been paid out in cash in the general manner of carrying out the business." The claims filed against the assignees amounted to nearly two hundred and forty thousand dollars. Some of the items to which we have referred are gathered from statements made by the witness

hitherto mentioned, who was a bookkeeper in the bank, made up from books of the bank. The books from which they were taken were produced at the trial, but were not offered in evidence, as we understand it. If they were offered they are not included in the abstracts, and have not been sent to this court.

Plaintiff objects to the statements on various grounds, but we think they were properly admitted in evidence, and should be considered on this appeal. *State v. Cadwell*, 79 Iowa, 432; *Casey v. Banking Co.*, 98 Iowa, 107; *Von Sachs v. Kretz*, 72 N. Y. 548. The books were present in court, and plaintiff had ample time and opportunity to examine them, and to cross-examine the witness. The witness stated that the lists he presented were correct, and were taken from the books of the bank. He was an officer of the court, and had charge of the books, and was asked to make statements therefrom, and to state the condition of the assets. Such evidence was certainly competent. At

4 the time the bank received the money belonging to the estate, it had cash on hand and with other banks amounting to about thirty-six thousand dollars, and it had in bills receivable about three hundred and twenty thousand dollars. Its total liabilities at that time were about three hundred and nineteen thousand dollars, not including its liability to the individual partners. During the time between July 1 and September 1, 1893, the deposit account was reduced more than thirty thousand dollars. At the time of the assignment the books showed that the bank had in cash and with other banks about three thousand eight hundred dollars, although as a matter of fact but about four hundred and fifty dollars in actual cash was turned over to the assignees. It had in bills receivable about two hundred and forty-five thousand dollars. Its deposits account had been reduced from about two hundred and ninety-six thousand dollars in February, 1893, to about one hundred and eighty thousand dollars at the time of the assignment. Its bills-pay-

able account, which was ten thousand dollars at the time it received the money of the estate of Hormel, amounted at the time of the assignment to twenty-two thousand five hundred dollars. But its indebtedness to other banks was a little larger in 1893 than in 1896. It paid out for interest during this time about twenty-one thousand dollars, and the amount of uncollectible notes it had at the time of the assignment has already been stated. There is an apparent discrepancy in the evidence regarding the amount collected by the assignees. The trial court found it amounted to something over eighty thousand dollars, but this, no doubt, refers to the amount collected on notes; for both the assignees admit that they have collected something over one hundred and thirty-eight thousand dollars. About seventeen thousand dollars of this last-named amount was collected on the overdraft account, which amounted to about thirty-seven thousand dollars at the time of the assignment. One of the members of the banking firm turned over his individual property to the assignees, and quite an amount of money was collected therefrom. The assignees have already declared a dividend of fifty per cent. to the general creditors, besides paying a preferred claim amounting to over six thousand one hundred dollars, and they say they will be able to pay another dividend of fifteen per cent. The assignees received the bills receivable owned by the bank, the small amount of cash found in its drawers, and the property of the individual members of the banking firm.

These are as near the controlling facts as it is possible to gather them from the record. We have so recently considered the law applicable to such facts that it is unnecessary to do more than refer to a few more important cases. In *Jones v. Chesebrough*, 105 Iowa, 303, which involved the same bank as the case at bar, we said that, "where trust money has been received, it is not material whether it is preserved in the form of money or other property, but it must appear, by presumption or otherwise, that it has been

preserved in the hands of the assignee as an increase of assets in his hands which may be taken without impairment to the rights of creditors." There, as here, it appeared that the bank made no new loans, nor acquired any kind of property with money belonging to plaintiff's estate, unless it be in the overdraft account. It also appeared that from the time of the receipt of the plaintiff's money, down to the time of the assignment, the amount paid out to depositors largely exceeded the amount received from them. The evidence in this case shows from some time in 1893, down to the making of the assignment, the same state of facts. There as here, the money plaintiff sought to recover was mingled with other money of the bank, and used by it in the usual and ordinary course of banking and in the payment of its debts. In view of this state of the record, we may with propriety quote again from that case: "While the payment of debts in that manner by a trust fund lessens the indebtedness of an insolvent estate, and may thereby increase the percentage of dividends declared from other funds, it does not follow that the assignee has any increase of assets because of it. It may follow that he has less debts to pay, and the estate is in that way benefited. But such a benefit to creditors is but partial, and, if such a payment is to serve as a reason for withdrawing an equal amount from the assignee, the result is an absolute loss for the creditors."

On behalf of plaintiff it is contended, however, that for a time after the deposit of the money of the estate the bank was in a prosperous condition, and was increasing its assets, that its financial troubles began with the panic of 5 1893; and that we should presume that the money in question was used in such a manner as to increase its assets. If that were the only showing in the case, there would be much force in plaintiff's contention. Although, if there is any presumption in the case, we suppose it ought to be that Ball, as executor, would not invest money belonging to the estate he represented without an order of court,

and that, if he loaned the money, he would take the investment made to represent it, not in the name of the bank, but in his own name, as executor. The primary question, however, is not whether the assets of the bank may have at one time been increased by this deposit. That result follows when any deposit is made. But was there an increase in the assets that came into the hands of the assignee? These assets we have already mentioned, and it is clear that the deposit did not increase the property or fund received by them from the individual members of the banking firm. It could not have gone into notes executed prior to the time it was received, and the evidence shows beyond question that no loans, other than renewals, were made by the bank after the deposit of the money belonging to the estate that plaintiff represents, except from money borrowed of other banks. Plaintiff's money is therefore not in the bills receivable. But, if it were there, the loss on this item of more than one hundred and seven thousand dollars makes the rule announced in *Jewell v. Clay*, 107 Iowa, 56, to which we will hereafter more particularly refer, apply.

If any fund in the hands of the assignees has been increased, it must be the overdraft account. There was a loss on this account of more than ten thousand dollars. However, a trust fund amounting to about six thousand two hundred dollars was allowed, which must have been taken from the amount received on overdrafts, as there is no other fund from which it could rightfully be taken.

Again, during the period between the deposit and the assignment the bank paid out about twenty thousand dollars in interest, besides the usual and ordinary expenses of the bank. Moreover, at the time the funds of the bank were being augmented, deposits were made by other people, and there is no means by which it may be told what, if any, of the deposits made for the estate went into this overdraft account. If it was augmented, the losses and payments to which we have referred have certainly exhausted all that

went to the assignees. The same thought applies with equal force to the cash found in the bank when the assignees went into possession.

Again, it appears that between a time shortly after the deposit that plaintiff seeks to recover was made and the failure of the bank, there was withdrawn from the bank by other depositors more than one hundred thousand dollars. As said in the *Jewell-Clay Case*, *supra* "In view of this evidence, it cannot be presumed that the property in which the loan (deposit) was invested was and continued to be of the full value of the loan, and that it passed to the assignees, and that the depreciation and loss were wholly in other property." In that case the firm was solvent when the money was received, but during the financial crisis of the year 1893 it became involved, and its assets decreased from one hundred to twelve per cent. None of the cases relied on by appellant, unless it be *Plow Co. v. Lamp*, 80 Iowa, 722, are in conflict with our conclusions. In *Independent Dist. of Boyer v. King*, 80 Iowa, 500, there was no showing as to what the assets were in the hands of the assignees, nor from what funds they had been derived. The case turned wholly on presumptions. It is there said: "It will be presumed, in the absence of a showing to the contrary, that it [the money] was preserved by them [the bank] in some form, and that it passed into the hands of their assignee." In *Nurse v. Satterlee*, 81 Iowa, 495, the money deposited was traced directly into a fund held by another bank. In *District Twp. of Eureka v. Farmers' Bank*, 88 Iowa, 194, the assignees and the creditors made a showing to the effect that certain real property held by the bank was acquired before plaintiff made its deposit, and this property was held not liable to be impressed with a trust. The assignees' contention was that a considerable amount of property transferred to him was not in any manner augmented by the plaintiff's deposit. He made no showing as to the other assets in his hands, and, after holding that no trust should be impressed

on the real estate, we said: "The burden was upon the assignees to show that it [the deposit] contributed nothing to the estate which they acquired by virtue of the assignment." To the extent that they had met that burden, we held the estate not liable. *In re Knapp*, 101 Iowa, 488, there was no showing whatever by the assignees as to the assets in his hands, or as to how these assets were accumulated. As already intimated, there are some things said in the *Davenport Plow Company Case* that seem to run counter to the rules herein announced; but in that case there was no showing by the assignee as to the assets received by him, or as to when or how they were acquired by his assignor. That part of the opinion on which plaintiff relies is purely dictum, and was disapproved in *Jones v. Chesebrough*, *supra*. In the case at bar it is shown that no part of the deposit plaintiff seeks to recover went into the bills receivable, and that if it did, there has been such a large shrinkage therein as that they cannot be said to have been augmented thereby; that, while some of it may have gone into the overdraft account, that account has been so diminished, and was of such a character, that plaintiff should not be allowed to profit therefrom at the expense of general creditors. Whatever presumption might have obtained in the absence of proof has been rebutted, or, at least, such a showing has been made as to render it entirely probable that much, if not all, of the deposit was lost. That plaintiff was a trust creditor does not of itself, entitle him to preference over general creditors. To obtain that right he must show, by presumption of law or otherwise, that his fund has been preserved in the hands of the assignee, as an increase of the assets of the estate, from which it may be taken without impairment of the rights of general creditors. *Cavin v. Gleason*, 105 N. Y. 262 (11 N. E. Rep. 504); *State v. Bank of Commerce*, 54 Neb. 725 (75 N. W. Rep. 28); *Jones v. Chesebrough*, *supra*. As sustaining our conclusions, see, also, *Insurance Co. v. Caldwell*, 59 Kan. 156 (52 Pac. Rep. 441); *In re Irish-*

American Bank, 70 Minn. 238 (73 N. W. Rep. 7); *Hubbard v. Manufacturing Co.* 53 Kan. 637 (37 Pac. Rep. 626). It may be observed, in closing, that *McLeod v. Evans*, 66 Wis. 401 (28 N. W. Rep. 123, 214), on which the dictum found in the *Plow Co. Case* was based, was overruled in *Silk Co. v. Flanders*, 87 Wis. 237 (58 N. W. Rep. 383).

Our conclusion is that the decree is right, and it is **AFFIRMED.**

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AMERICAN SAVINGS BANK, Appellee, v. SHAVER CARRIAGE COMPANY AND W. T. SHAVER, Appellants.

Lease: AMBIGUITY: *Parol evidence.* A lease providing for \$600 rent to be paid the first year, \$660 for the next two years, and \$720 for the next and last two years, is ambiguous, and parol
2 evidence will be received to show that the rent to be paid the second and third years is \$660 per year.

Appeal: EXCEPTIONS TO INSTRUCTIONS. Where an exception is not taken at the time, to the court's instructions, defendants' argument in support of a motion in arrest of judgment, made within
1 three days after verdict, not specifying instructions of the court as erroneous, nor excepting to any part of the charge to the jury, will not be regarded as the exception required by law; hence the instructions will not be reviewed on appeal.

Appeal from Polk District Court.—HON. THOMAS F. STEVENSON, Judge.

SATURDAY, APRIL 14, 1900.

ACTION to recover rent. There was a trial to a jury, and a verdict and judgment for the plaintiff, from which defendants appeal.—*Affirmed.*

Warren Walker and Read & Read for appellants.

L. Ward Bannister and Berryhill & Henry for appellee.

SHERWIN, J.—This is an action brought by the plaintiff to recover of the defendants rent alleged to be due under

a written lease, and for rent accrued prior to the execution of the lease, which was evidenced by a promissory note. The appellants in their argument complain of the instructions given by the court. The record, however,
1 shows that no exceptions were taken to the instructions at the time they were given. Nor is it claimed that any of the instructions given were subsequently excepted to, except as appears in the motion made by the defendants in arrest of judgment, which was filed within three days after the verdict was taken. In this motion the court's attention was not called to any specific instruction. Nor was formal exception taken to any part of the charge. It says: "The court, having erred in determining the effect of the written lease, should correct the error by setting the verdict aside." This argument to the trial court cannot be treated as the exception required by law. To so hold would be to wholly disregard the procedure prescribed by the statute. The instruction, not having been excepted to, cannot be reviewed by this court.

The written lease provided for rent in the language following, to wit: "Six hundred dollars for the first year, six hundred and sixty dollars for the next two years, and seven
2 hundred and twenty dollars for the next and last two years." The court, on its own motion, recalled the defendant W. T. Shaver, and asked him the amount of rent agreed upon per year for the second and third years. He answered that he made the agreement, and that it was for six hundred and sixty dollars per year for the second and third years. This evidence was excepted to and its admission is now assigned as error. Under the rule laid down in *Cooker Co. v. Olive*, 82 Iowa, 122, the lease was ambiguous, and parol evidence as to the real agreement of the parties was admissible. This disposes of all questions we can determine under the record before us, and the case is
AFFIRMED.

NELLIE VAN BERGEN, a minor, by MARY VAN BERGEN, her next friend, v. JOHN EULBERG, Appellant.

Injuries by Dogs: DEFENSES TO CLAIM FOR. Under Code, section 1485, providing that the owner of a dog shall be liable to the party injured for all damages done by his dog, except when the party injured is doing an unlawful act, it is no defense to an action
1 for injuries from a bite of defendant's dog to show that several months before the injury, the plaintiff threw stones at the dog.

Appeal: INSTRUCTIONS AND PLEADING. It is error, in an action to recover for injuries resulting from a bite of defendant's dog, to instruct that plaintiff might recover for such physical suffering as appeared from the evidence reasonably certain to occur in the future, when no claim for damages for future pain was
2 made in the petition, and no evidence was introduced tending to prove that she was likely to suffer any.

Appeal from Sioux District Court.—HON. GEORGE W. WAKEFIELD, Judge.

SATURDAY, APRIL 14, 1900.

ACTION for damages resulting from a bite of defendant's dog. The defendant appeals from a judgment against him.—*Reversed.*

P. D. Van Oosterhout for appellant.

Robt. W. Olmstead for appellee.

LADD, J.—That the injured girl threw sticks and stones at the dog several months before she was bitten furnished it no excuse. A dog has no right to brood over its wrongs, and remember in malice. The only defense avail-
1 able to the dog's master is the doing of an unlawful act, at the time of the attack, by the person injured.

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Shultz v. Griffith, 103 Iowa, 150; *Stuber v. Gannon*, 98 Iowa, 228. See *Gregory v. Woodworth*, 93 Iowa, 246.

II. The jury, after retiring to deliberate on their verdict, inquired of the court whether they should consider "what the injuries might lead to in the future," and were instructed, in substance, that an allowance might be made for such physical suffering, if any, as appeared from the evidence reasonably certain to occur thereafter.

As the petition made no claim for damages based on future pain, and no evidence was introduced tending to prove her likely to suffer any, the giving of this instruction was error. *Shultz v. Griffith*, 103 Iowa, 150.—REVERSED.

L. SHOONOVER V. OSBORNE BROS. *et al.*, Defendants, ELLA F. AND ADELLA D. OSBORNE AND G. W. & G. L. LOVELL, Interveners, Appellants.

Attachment on Land: LEVY: Priorities. Where a sheriff, on August 5, 1896, in levying an attachment on land, made an entry in the incumbrance book, reciting the fact of the levy, and made such return on the writ of attachment, and notice of the levy was not given to defendant until August 10, 1896, he not being at home, the lien created by the levy attached to the land when the sheriff indorsed the fact of the levy on the writ of attachment, and the lien is superior to liens created by mortgage given by defendant on August 6, 1896, and confession of judgment made on August 7, 1896.

NOTICE OF LEVY. Under Code 1873, section 2967, providing that stock and interest owned by defendant in any company may be attached by giving notice of the attachment to defendant, notice of an attachment of land is not necessary to the validity of the attachment, but only to complete the levy.

Reasonable time for notice. As a notice to defendant of a levy on land under an attachment is not necessary to the validity of the attachment, but only to complete the levy, notice given to defendant five days after the levy, is given in reasonable time.

• *Appeal from Jones District Court.*—HON. WILLIAM G. THOMPSON, Judge.

SATURDAY, APRIL 14, 1900.

IN the case of *Schoonover v. Osborne*, 108 Iowa, 452, a writ of attachment was levied on the land of David Osborne. Ella F. and Adella D. Osborne and G. W. and G. L. Lovell intervened, alleging they held liens prior and superior to that of such levy. The issues joined by interveners and plaintiff were transferred to the equity side of the calendar. On hearing, the lien of the attachment, levy was declared superior, and the interveners appeal.—*Affirmed.*

Sheehan & McCarn, M. W. Herrick, F. O. Ellison, and J. W. Doxsee for appellants.

Milton Remley and Ercanbrack & Lawrence for appellees.

LADD, J.—In the afternoon of August 6, 1896, David Osborne executed to his daughters Ella F. and Adella D. Osborne a mortgage on five hundred and sixteen acres of land, then in his name, to secure an alleged indebtedness to them of ten thousand three hundred and thirty-four dollars and seventy-five cents. This mortgage was filed for record on the same day, at 7:25 o'clock P. M. It described the land as in range 86 instead of 85, and on the following day another mortgage, making the proper correction, was signed and recorded. David Osborne also confessed judgment in favor of G. W. and G. L. Lovell on the afternoon of August 7, 1896, for the sum of five hundred and twenty-five
1 dollars and forty-five cents. Prior to these transactions, however, and on the fifth day of the same month, at 7:45 o'clock P. M., the writ of attachment, issued

in the main case of *Schoonover v. Osborne*, 108 Iowa, 453, was placed in the hands of the sheriff. That officer at once made the proper entry in the incumbrance book, reciting the fact of the levy, and indorsed the following return on the back of the writ: "State of Iowa, Jones County—ss.: This is to certify that this writ came into my hands on the 5th day of August, 1896, at 7:45 o'clock P. M. I served the same in Jones county, Iowa, by attaching the following described property as the property of Lewis D. Osborne and David Osborne, defendants herein, to-wit: [Here the real estate is described.] P. O. Babcock, Sheriff of Jones County, Iowa." Notice of the levy was served on David Osborne, August 10, 1896, and the return thereof indorsed on the writ some days later.

I. When did the lien created by the levy of the writ attach to the real estate? A levy on land, as there can be no seizure, must, of necessity, be almost, if not entirely, symbolical. The mere determination in the mind of the officer, however, is not enough, unless evidenced by some unequivocal act clearly indicating his intention of appropriating or singling out certain real estate for the satisfaction of the debt. There is some diversity of opinion as to what this shall be. Going upon the land, as such
2 an act is not notorious, and no visible marks are left, would seem a useless ceremony; and for this reason the better-considered cases hold that, in the absence of statutory provisions, a levy may be made in the sheriff's office without even seeing it. Mr. Shinn, in his work on Attachments and Garnishments (section 214), says: "It is not necessary, even as against a *bona fide* purchaser, that the officer should take actual notice of the property, nor that he should go near it, nor see it, but he must do some act, make some entry or memorandum, indicative of his intention; and when he has done this, with a fixed purpose in his mind, he has made a legal levy. Simply making a return that he has attached is sufficient." To the same effect, see.

also, Drake Attachments, section 236; Freeman Executions, section 280; 8 Encl. Pl. & Prac. 557. In *Hammel v. Insurance Co.*, 54 Wis. 72 (11 N. W. Rep. 349), the court declared a levy on land to be impossible; while in *Perrin v. Leverett*, 13 Mass. 129, and *Lynch v. Earle*, 18 R. I. 531 (28 Atl. Rep. 763), the mental process of levying the writ seems to have been thought enough. In the latter case the court, speaking through Tillinghast, J., concluded: "The statute, then, failing to require the doing of any particular act or thing by the sheriff in order to constitute a levy of the execution, and this proceeding being one which is entirely regulated by statute, the subjecting of real property to satisfy debts being unknown to the common law, we see no reason why he may not go through with the mere mental process of levying an execution in Foster or Burrillville, while sitting in his office in Providence, and at the same time comply with said statutory requirement. The usual and safer mode of levying an execution on real estate doubtless is to endorse on the execution a statement to the effect that it is levied, describing the estate, and noting on the execution the date and time of day of the levy; but this is done mainly for the purpose of aiding the memory of the officer when he comes to make his return thereon. At any rate, it is clearly not essential to the making of the levy, as it can be as effectually done after as at the time when the officer decides to make said levy." In *Vroman v. Thompson*, 51 Mich. 452 (16 N. W. Rep. 810), the court, in holding that causing notice of levy to be recorded as required by statute was sufficient, said: "He [appellant] insists that no levy upon land is legally possible, unless a memorandum of the fact is endorsed on the execution. That the officer must attest the intellectual act of levying by a written memorial of some kind cannot be denied. So much is fairly implied. But it is not admitted that the visible evidence required can only exist in the form of an indorsement on

this writ. The statute does not require it, and there is nothing in the nature of the thing demanding it. The object is to have some outward and permanent manifestation of the fact,—something which is durable, intelligible, and public, in the nature of a record, to which all may resort who are entitled to information and desire it. The necessity is for evidence which is plain and accessible, and this is well afforded by the recorded notice prescribed by the statute.” The supreme court of Colorado reached a similar conclusion in *Raynolds v. Ray*, 12 Col. 108 (20 Pac. Rep. 5). We are precluded by former decisions of this court from announcing the rule as broadly as was done in these authorities. In *Collier v. French*, 64 Iowa, 577; *Bank v. Kellogg*, 81 Iowa, 124, and *First Nat. Bank v. Jasper County Bank*, 71 Iowa, 486, the entry in the incumbrance book was held to form no part of the levy. And in the last case the court declared that a levy on real estate, to be valid, must be evidenced by a return of service on the writ, signed by the officer. Only by this signature can the sheriff attest his acts. It was there said: “At least, the sheriff should have made returns on the writs which would have given notice to the world of the levies.” The word “returns” evidently refers to the indorsement of the sheriff. As already remarked, the levy on real estate must of necessity be a paper levy, and the unequivocal act, prior to the adoption of the Code, indicating it, was the indorsement of the sheriff on the writ, showing it. Such was the decision in *First Nat. Bank v. Jasper Co. Bank*, *supra*, and it is well sustained by authority. *Isam v. Hooks*, 46 Ga. 309; *Hamblen v. Hamblen*, 33 Miss, 455; *Crosby v. Allyn*, 5 Me. 453; *Perrin v. Leverett*, 13 Mass. 128; *Bland v. Whitfield*, 46 N. C. 125; *Hancock v. Henderson*, 45 Tex, 479; *Sanger v. Trammell*, 66 Tex. 361 (1 S. W. Rep. 378); *Fenno v. Coulter*, 14 Ark. 43; *Martin v. Bowie*, 37 S. C. 102 (15 S. E. Rep. 736).

II. The appellant asserts that, under the statute, the service of notice on the defendant was an essential part of

the levy, without which no lien attached. That portion material to our inquiry may be set out: "Stock or interest owned by the defendant in any company, and also
3 debts, due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows: (1) By giving the defendant in the action if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment." Section 2967 of Code 1873. This necessarily presupposes something to have been done, *i. e.*, the writ of attachment to have been served. That was our conclusion in *Hamilton v. Hartinger*, 96 Iowa, 12, where the court, speaking through Given, J., said, "The notice required is 'notice of attachment.' We have seen that in this case written 'notice of attachment' and of the levy upon the real estate was given to the defendant. If 'notice of attachment' means simply notice of its issuance, then defendant had the written notice required, but, if it means also notice of the levy, then he did not have the written notice of the levy on said personal property. We think the notice contemplated is of the levy, and therefore the levy upon said personal property was not valid, because no written notice of said levy was given to the defendant." Having so construed the statute with reference to ~~personality~~, a similar construction logically follows when applied to land. If notice is required only to complete a levy on chattels, as was held in *Bank v. Converse*, 101 Iowa, 310, then it can serve no other purpose, in event of a levy on real estate. In that case, Robinson, J., speaking for the court, said: "In many cases, it is impossible to notify the defendant at the moment his property is seized under the writ. He may be in a distant part of the county, and his whereabouts may be unknown, and it cannot have been the legislative intent that in such case the attaching creditor acquires no rights, until notice of the levy is served, which are valid against subse-

quent creditors or grantees. We cannot conceive of any reason for such an interpretation of the statute, unless required by the language used. That does not state that the levy creates no right until notice thereof is given to the defendant, but that 'notice of attachment must be given.' In the absence of a more specific designation of the time when it must be given, it will be sufficient if given within a reasonable time, to be determined from all the circumstances of the case, and the levy will be effectual as a lien until the expiration of that time." Nor has notice ever been held in this state essential to make a levy on land. In *Bank v. Kellogg*, 81 Iowa, 124, and in *Anderson v. Plow Co.*, 101 Iowa, 747, the levy was invalid because never completed by service on the defendants. The same rule pertains to levies on personal property. *Hamilton v. Hartinger*, 96 Iowa, 12; *Commercial Nat. Bank v. Farmers' & Traders' Nat. Bank*, 82 Iowa, 192. In the last case notice to the officers of a corporation was adjudged essential to a levy on stock in a company. This was because of an express provision of the statute that such stocks be attached "by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof," of the fact. This apprises those in charge of the transfer books of what has been done, and, as valid transfers of stock may not be made as against third parties save on such books, operates as constructive notice. *Moore v. Opera-House Co.*, 81 Iowa, 46. It serves the same office in a levy on such intangible property as possession does in the case of ordinary personalty or entry on the incumbrance book in the attachment of realty; the design in making a levy being that something be done to carry notice to third parties for their protection. The law, in requiring notice to be served on the defendant in the action, can have no other purpose than that of enabling him in apt time to guard any interests he may have in the property attached. If so, then there is no reason for construing it a part of the levy, and thereby putting it in

the power of the debtor, by sale or the execution of a mortgage, to defeat the attaching creditor, however diligent.

III. We conclude that the lien attached when the sheriff indorsed the fact of making the levy on the writ of attachment; that the service of notice on David Osborne was only essential in order to complete the levy; and that this might

be made within a reasonable time after such indorsement. The sheriff did not find him at his home, some distance from the county seat, the day after the

levy, and did not serve notice on him until five days after it was made. The same promptness in giving notice of a levy on real estate is not demanded as of that on personalty. Delay will seldom occasion expense to the debtor, while costs are continually accumulating when personal property is held. There was no change whatever in the situation of Osborne or of the interveners, and, under the circumstances disclosed, service must be held to have been made within a reasonable time. See *Schoonover v. Osborne*, 108 Iowa, 453. The sheriff has other duties to perform and reasonable promptness in dispatching business, not exacted instantly, is all that should be insisted upon. The ruling was right, and the decree is **AFFIRMED**.

C. McGUIRE v. J. P. KENEFICK, Appellant.

Evidence: REPUTATION: *Impeachment*. Inquiry as to the reputation of a witness should be restricted to the neighborhood of his present residence and to proof of reputation near to the time of trial. If the residence is so recently acquired that his present neighbors are not likely to have ascertained his character and he is not likely to have thrown off the one established in his former abode, his reputation in the former abode may be received and so, if he has subsequently remained in no place long enough to become well known to his neighbors.

SAME. Evidence as to the reputation of a witness in a town he had left seven years before was inadmissible in the absence of evidence that he had not maintained a residence elsewhere in the meantime.

111	147
117	507

111	147
125	70

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130	238

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135	486

111	147
143	658
144	393

USURY: *Independent loans.* Where usury was the issue, evidence of another and usurious loan made between the same parties, 1 but having no connection with the note in question, was inadmissible.

Appeal: **ARGUMENT OF EXCEPTIONS.** Exceptions to rulings, which 4 are not argued, cannot be considered on appeal.

Appeal from Hardin District Court.—HON. D. R. HINDMAN, Judge.

SATURDAY, APRIL 14, 1900.

ACTION on promissory note. Defense, usury. The defendant appeals from judgment on a verdict against him. —*Affirmed.*

J. H. Scales for appellant.

Albrook & Lundy for appellee.

LADD, J.—The court rightly excluded evidence sought to be elicited from the defendant on direct examination concerning a usurious loan previously made to him by 1 the plaintiff. It was an entirely independent transaction, having no possible connection with the execution of the note in suit.

II. No unvarying rule as to how far back inquiry concerning the general reputation of a witness for truth and veracity may properly extend can be stated, as this must, of necessity, depend on the peculiar facts of each case. Because of the presumption that status, once established, continues until a change is shown, some courts hold that proof of such reputation at a time somewhat remote from the trial, and at a place of residence other than then had, may be received; these circumstances affecting only the weight to be given the evidence. *Mynatt v. Hudson*, 66 Tex. 66 (17 S. W. Rep. 396); *Kelly v. State*, 61 Ala. 19; *Snow v. Grace*, 29 Ark. 131; *People v. Abbot*, 19 Wend. 192. A person of

mature age, possessed of character notoriously bad, will be unlikely to so reform as to acquire a different character within a brief time. Nevertheless, men change, though not often suddenly; and evidence of recent reputation, near the time of trial, is ordinarily entitled to greater weight than should be accorded that of a more remote period. This is recognized by all the authorities, and, when obtainable, it would seem such evidence ought to be produced, because of its superior quality, especially where, as in this state, the practice of limiting the number of witnesses testifying to character prevails. Besides, to extend the inquiry far in the past, and to a residence other than that recently had, may impose an unwarrantable burden on the witness whose character is assailed, and frequently work irreparable wrong. As said by Brewer, J., in *Fisher v. Conway*, 21 Kan. 25; "Impeaching testimony is for the purpose of discrediting the witness by showing that the community in which he lives do not believe what he says; that he is such a notorious liar that he is generally disbelieved. It is his present credibility that is to be attacked. Is he now to be believed? What do his neighbors think and say of him at the present time; not what did they think and say months or years ago? True, general reputation is not established in a day; and so the inquiry is not to be restricted to any particular week or month or year. The reputation a man has in any community is based upon all the years, few or many, of his living in such community." To the same effect, see *Sun Fire Office v. Ayerst*, 37 Neb. 184 (55 N. W. Rep. 636); *City of Aurora v. Cobb*, 21 Ind. 492; *Packet Co. v. McCool*, 83 Ind. 392; *Webber v. Hanke*, 4 Mich. 198; *Keator v. People*, 32 Mich. 484; *Young v. Com.*, 6 Bush, 312; *Wood v. Matthews*, 73 Mo. 477; *Smith v. Hine*, 179 Pa. Sup. 203 (36 Atl. Rep. 222). In *State v. Potts*, 78 Iowa, 659, the defendant had established a reputation in Des Moines by five years' residence, and the admission of evidence of his previous reputation at Newton and Brooklyn of the same state

was adjudged error. But in *Schoep v. Insurance Co.*, 104 Iowa, 356, the witness had removed from Sioux Center a year previous to the trial, and, it not appearing that he had acquired a new residence at any other place, proof of reputation there was held to have been properly received. In that case we said, "The rule in regard to the admission of such evidence, so far as it relates to the time when the reputation existed, is somewhat flexible." Whether a new residence has been acquired, and for such a length of time and under such circumstances as that proof of character in that neighborhood, rather than at the former home, must be adduced, is for the determination of the trial court; and its decision, ought to be final. *Teese v. Huntington*, 23 How. 2 (16 L. Ed. 479); *Holliday v. Cohen*, 34 Ark. 707; *Brown v. Perez*, 89 Tex. Sup. 282 (34 S. W. Rep. 725); *Buss v. Page*, 32 Minn. 111 (19 N. W. Rep. 738). Chief Justice Bleckley, in *Watkins v. State*, 82 Ga. 231 (8 S. E. Rep. 875, 14 Am. St. Rep. 155), declared that "on such a question the past and present are so related that no complete severance between them can be made. * * * As the law prescribes no definite limit in time, we think the discretion of the court must, of necessity, be exercised in every instance where the proposed evidence is not so remote as to preclude all difference of opinion." There the witness had moved to Florida four years before the trial, and, as the statute made no provision for taking depositions in criminal cases outside of the state, rejecting evidence of reputation while residing in Georgia was adjudged error. But it sometimes happens that a witness who has established a reputation at a particular locality leaves it, and thereafter wanders from place to place the time of the trial, without remaining anywhere long enough to become thoroughly known to his neighbors. In a case, evidence of his reputation at that locality may be received, though antedating the time of the trial many years. *Holmes v. Statler*, 17 Ill. 453; *Snow v. Grace*, 29

Ark. 131; *Blackburn v. Mann*, 85 Ill. 222. See, generally, cases collected in 10 Enc. Pl. & Prac. 307. We
2 reach the conclusion that the rule best adapted to such an investigation restricts inquiry to the neighborhood of the present residence of a witness sought to be impeached, and to proof of reputation at a time near that of the trial. When a residence has been so recently acquired that the neighbors of the witness are not likely to have ascertained his true character, and he, in all probability, has not thrown off that established in the neighborhood of his former abode, evidence of his reputation at the latter place may be received, as it may also when he has subsequently remained in no place long enough to become well known to his neighbors.

III. Though McGuire was not asked his place of residence, it appeared that he had moved from Ackley more than seven years before the trial. To the question, "When did
3 you first go to Kansas City?" he answered: "I cannot say exactly. I think it was seven years ago.

I came back, and claimed my residence in Franklin county, occasionally, after I went there. I never bought any property there in Kansas City." One of the impeaching witnesses thought his residence at Britt, and another had heard him say two years before that he lived in Kansas City. There was also evidence tending to show him to have been in Ackley frequently, transacting business, several weeks of each year. As he ceased to be a resident of the neighborhood of Ackley more than seven years before the trial, evidence of his general reputation there was inadmissible, unless it appeared that he had not maintained a residence elsewhere in the meantime. This was not shown, and, without some proof bringing him within the exceptions heretofore noted, we think the impeaching evidence rightly rejected. Whether one may acquire a reputation, provable in court, at his place of business, when other than the locality

of his residence, is not presented in this record, as McGuire was at Ackley but a short time each year, during which he is not shown to have established a general reputation. Exceptions to rulings on objections to other questions propounded are not argued, and for this reason have received no attention.—**AFFIRMED.**

O. ARNOLD, Executor of the Estate of ROSINA ARNOLD, Appellant, v. THE CITY OF FORT DODGE, IOWA et al.

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127 475
127 476

Publishing of Paving Notice: PRESUMPTIONS. Where plaintiff admitted that a notice for a street improvement was published in two city papers, and there was no evidence that it did not appear for the requisite number of days, the court will presume that it was published for the required time.

SUFFICIENCY OF NOTICE. Under Acts Twenty-third General Assembly, chapter 14, section 3, as amended by Acts Twenty-fourth General Assembly, chapter 12, requiring cities to publish a notice of any public improvement for not less than ten days in two newspapers of said city stating the "extent of the work" and "the kind of material to be used," etc., a notice of a proposed improvement to curb and gutter a street, which stated that bids would be received to curb and gutter both sides of Market street, from Second street to Division street, except where the same is already curbed and guttered, and that the work must be done in accordance with plans and specifications on file in the city clerk's office was sufficient to satisfy the requirements of the statute in a case where neither a fraud, lack of competition or excessive cost is charged.

NOTICE BY GENERAL ORDINANCE. Where a general city ordinance provided that the cost of street improvements should be assessed against the abutting property, an objection by the plaintiff that she had no notice that the cost of guttering and curbing the street in front of her lots was to be assessed against them was unavailable.

OPPORTUNITY TO RESIST ASSESSMENT. Where a resolution passed by the city council ordering an assessment to curb and gutter a street in front of plaintiff's lots, and a schedule describing the lots, and the amount assessed against each, and a certificate of the city engineer as to the correctness of the schedule, and a notice fixing the date on which the city council would hear

5 grievances and make all equitable corrections, were all pub-
6 lished as required by law, and the plaintiff saw these notices
before the date set by the council to hear grievances, an objec-
tion that she had no opportunity to be heard in opposition to
the assessment was untenable.

DEPARTURE FROM PAVING SPECIFICATIONS: *Estoppel*. Where the ma-
terial and work used in guttering and curbing a street were in
substantial compliance with the contract, and the plaintiff's
7 husband as her agent, was frequently present as the work pro-
gressed, and the only change he suggested was made, plaintiff
was estopped from questioning the validity of her assessment
on the ground that the work was not done in accordance with
the specifications.

Appeal from Webster District Court.—HON. D. R. HIND-
MAN, Judge.

SATURDAY, APRIL 14, 1900.

ACTION to restrain the collection of a special assess-
ment for guttering and curbing in front of plaintiff's lots.
Judgment for defendants. Plaintiff appeals.—*Affirmed*.

Frank Farrel for appellant.

M. J. Mitchell for appellees.

SHERWIN, J.—In August, 1892, the city of Ft. Dodge
contracted for, and soon thereafter constructed, a gutter and
curb along certain streets upon which the plaintiff's land
abutted, and assessed thereto a share of the cost of such gutter
and curb. The plaintiff seeks to enjoin the collection of this
special tax on several grounds, which we will now notice.

It is urged that the notice inviting bids for the work
is not such as the law required. On this subject the lan-
guage of the petition is as follows: "That the city council
of Ft. Dodge, defendant herein, did not give notice
1 by publication in two newspapers in said city, for
a period of ten days, stating the extent of the work
to be done and the material to be used, as required by law."

At the time the contract was let, and at the time the work was done thereunder and the assessments made, chapter 14, Acts of the Twenty-third General Assembly, was in force, and, as amended by chapter 12 of the Acts of the Twenty-fourth General Assembly, applying it to cities of over 4,000 population, was the law under which the city of Ft. Dodge acted in the matter in question. So much of section 3 of said chapter as is necessary to present the point in controversy is as follows: "After public notice for not less than 10 days in, at least, two newspapers of said city, which notice shall state as nearly as practicable the extent of the work; the kind of material to be furnished; when the work shall be done; and at what time the proposals shall be acted upon." It is well to notice in this connection that the only complaint the petition makes is as to the length of time the notice was published, and as to its failure to state the extent

of the work and the material to be used. The notice
2 given is as follows: "Notice to Contractors. Notice is hereby given that the city council of Ft. Dodge, Iowa, will receive sealed proposals to curb and gutter both sides of Market street, between Second street and Division street, except where already curbed and guttered. Said proposal must be to furnish all stone, brick, and other material, and do all the work to make said curbing and guttering complete in accordance with the plans and specifications for the same now on file, and which may be examined in the office of the city clerk (opposite post office). Bids will be received until 2 p. m., Monday, Aug. 1, 1892. The city reserves the right to reject any and all bids. By order of the com-

3 mittee. D. A. Weller, City Clerk." It is admitted that this notice was published in two daily papers in Ft. Dodge, but whether for the requisite ten days or not does not certainly appear. There is no evidence that it was not so published; hence the presumption of the law is that it was, and we must so hold. In *Jenney v. City of Des Moines*, 103 Iowa, 347, it is said: "Now, by the very terms of the

printed advertisements inviting bids, the plans and specifications, * * * were made a part of the said proposal, a fair construction of the statute * * * would not require the advertisement to contain in detail the number of pounds of iron or other material to be used in the structure.

4 If, from the advertisement, and the plans and specifications, which were a part of the proposal, and which were on file in the office of the board, and open to the inspection of all persons, the amount and different kinds of material appeared, or if, from what did appear in said plans and specifications, the amount and different kinds of material might be determined beyond question by mere computation, then the spirit and intent of the law * * * were complied with." In the case at bar the plans and specifications were on file, as stated in the notice, and it is not claimed they were not full and complete, and did not furnish all the information required for competitive bids. This case is, therefore, clearly within the rule announced in *Jenney v. City of Des Moines*, and is governed thereby. And this, we think, applies as well to the extent of the work as to the material used. Contractors could as readily determine the one as the other from the information contained in the notice and specifications. No claim is made of fraud, or of lack of competition for this work, nor of excessive cost.

Plaintiff further contends that no notice was given her that the cost of the guttering and curbing in question would be assessed against her property, and that she had no opportunity to be heard in opposition thereto. There was
5 in force at the time a general ordinance of the city providing for the general improvement of streets, and the assessment of the cost thereof to the abutting property. This was Revised Ordinance No. 44. On the sixth day of July, 1892, a resolution was duly adopted by the city council, and recorded, providing for the particular improvement under consideration. On the fourteenth day of August, 1893, the following resolution was adopted by the city

council: "Be it resolved by the city council of the city of Ft. Dodge, Iowa, that there is hereby ordered an assessment on all lots or parcels of ground as herein following described of the amount set opposite to each said lot or parcel of land as by law and Ordinance No. 44 of the ordinances of Ft. Dodge, Iowa, providing for the levy of special assessments for curbing and guttering. D. A. Weller, City Clerk." Following this resolution was a description of the plaintiff's property, and the amounts in detail with which it was proposed to charge it. To this was attached a certificate in the following form: "I hereby certify that the above is a true statement of the amount of curbstone and gutter pavement and amount of assessment against each property owner, based upon the price of one dollar and sixty-nine cents per foot, and the various incidental expenses connected with the construction, as per order of special committee. F. L. Easley, City Engineer." Following the resolution, schedule, and certificate of the city engineer was this notice: "Notice. All persons liable under the above assessment are hereby notified that they must pay the amount assessed on them or their lot or parcels of ground therein described to the city treasurer on or before the 15th day of September, 1893, and all assessments, as above described, not paid before the 15th day of October, 1893, will be certified to the county auditor to be placed upon the tax list, and collected in the same manner as other city taxes. You are also notified that the city council will meet in regular session on the 25th day of August, 1893, at 8 o'clock p. m., at the council rooms, to hear any and all grievances and make all equitable corrections that may be brought to their notice. Beth Vincent, City Treasurer, by D. A. Weller, City Clerk." Appellant cedes that the resolution, schedule, certificate, and notice were published in two daily papers, but not for the full ten days required by the statute. There is, however, evidence tending to prove that the notice was published the full period required. We also think the evidence fairly supports the

conclusion that a plat, made in substantial compliance with the law, was filed long before August 14, 1893. Hence we think the objection to the notice on these two grounds is not sustained. It is true, the notice itself is not as formal and specific as required in respect to the filing of written objections with the city clerk before its next meeting, but it does fix the time at which the council will meet to hear the objections in person, and to make "all equitable corrections that may be brought to their notice." The appellant is charged with knowledge of the law giving her right to file written objections, if she so desired. In addition to this right, she was also given the privilege of appearing before the council in person to present her "grievances," if any she had. The assessment was clearly not final when the action of August 14, 1893, was taken, because the council therein recognized the right of property owners to appear and be heard before the charge on the property should become absolute, and, in effect, so stated in the notice; and plaintiff does not claim that she was misled thereby. Her only claim is "that she

6 was at no time given an opportunity to be heard in opposition to such assessment." Furthermore, it is almost conclusively shown that she knew from the inception of the work that the cost thereof was to be charged to the abutting property. She saw, also, the published resolution, schedule, certificate, and notice before the council meeting of August 25, 1893, and knew that she could then and there be heard. She then had the notice and the opportunity to be heard before the assessment attached and became a lien upon her property, and this is all the law requires. *Gatch v. City of Des Moines*, 63 Iowa, 718; *Ford v. Town of North Des Moines*, 80 Iowa, 626; *Trustees of Griswold College v. City of Davenport*, 65 Iowa, 635.

The plaintiff further contends that the assessment is invalid because the work of guttering and curbing was not done in accordance with the ordinance and the specifications providing therefor, and because of a change of grade in the

street, which damaged her property. The evidence shows that the material and work were in substantial compliance with the contract, and were accepted and paid for by the city. When the improvement was begun, there had been no grade established on the street, but by ordinance regularly passed it was established before the work was completed. The plaintiff herein was the agent of his wife, the owner of the lots. He was present frequently during the progress of the work, and at one time made complaint that the grade was too low in front of her property. It was then changed, and made to comply with his wishes, and no further complaint was made. Under these circumstances we think the plaintiff is estopped from now making this defense, if, indeed, it can be interposed at all against the validity of the assessment. *Pratt v. Railway Co.*, 72 Iowa, 247; *Preston v. City of Cedar Rapids*, 95 Iowa, 71. The judgment of the district court is AFFIRMED.

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132	391
132	392

EMMA FERGUSON V. B. A. FERGUSON, Appellant.

Judgment for Alimony: MODIFICATION. Where plaintiff, who has been granted a divorce, and a general judgment for alimony and attorney's fees, filed a supplemental petition for permanent alimony, etc., alleging that since the rendering of the decree defendant had resorted to fraud to defeat the collection of alimony, and that he claimed a homestead in part of his lands, such petition did not show a change in the circumstances of the parties, entitling plaintiff to the relief demanded under Code, section 3180, authorizing a court to make changes in a divorce decree in respect to property, parties, and maintenance, where circumstances render such changes expedient; there being no claim that defendant failed to fully disclose his property upon the trial of the original case or that he made then any misrepresentations as to the amount or value of his property.

Real from Jones District Court.—HON. WILLIAM G. THOMPSON, Judge.

SATURDAY, APRIL 14, 1900.

ACTION in equity to enlarge alimony granted plaintiff in original decree, and to establish the same as a lien upon certain land of defendant. There was a decree for the plaintiff establishing the lien as prayed. Defendant appeals.—*Reversed.*

J. S. Stacy for appellant.

C. W. Kepler for appellee.

SHERWIN, J.—The original action was a divorce proceeding brought by the plaintiff against the defendant in Jones county. On the twenty-first day of December, 1897, a decree was entered divorcing the plaintiff from the defendant, and giving her a general judgment for alimony and attorney's fees in the sum of six hundred dollars. This action is supplemental to the original one. The petition herein was filed on the twenty-second day of October, 1898. The plaintiff prays that she be given one thousand dollars permanent alimony, and two hundred dollars for attorney's fees, and that the judgment therefor be established as a lien upon the defendant's land. The prayer for the modification of the original decree is based upon section 3180 of the Code, which is as follows: "When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties, as shall be right. Subsequent changes may be made by it in these respects when circumstances render them expedient." Upon the trial of the original case the defendant fully disclosed his property, both real and personal. It appeared from his testimony that he owned eighty acres of land in Davis county, Iowa, which was mortgaged for one thousand two hundred and fifty dollars, and that that was all the land he did own. It is not contended that he made any misrepresentations as to the amount or value of his property. But the plaintiff does allege that, since the judgment for alimony

was rendered against him, he has resorted to deceit and artifice to defeat its collection, and that he is claiming a homestead right in a part of this land. A general demurrer to the petition was interposed, which was overruled by the trial court. This demurrer should have been sustained. Section 3180 is substantially the same as section 2537 of the Revision. That section was construed and applied to a case precisely like the one at bar in all essential respects in *Wilde v. Wilde*, 36 Iowa, 319. In the above case the court followed *Blythe v. Blythe*, 25 Iowa, 266, where it is said: "Although the court granting a divorce has, by force of our statute, power to make changes in the decree in respect to property or children, yet this power certainly ought not to be exercised, only upon such change of circumstances as demand a change in the decree. That is to say, the original decree is conclusive upon the parties as to their then circumstances, and the power to make changes in the decree is not a power to grant a new trial, or retry the same cases, but only to adapt the decree to the new or changed circumstances of the parties." No new or changed circumstances of the parties were pleaded in this case. The defendant had the same homestead right the original general judgment was rendered against that he has now. That he has failed to pay that judgment and is now seeking to avoid it, does not bring the case within the statute. The plaintiff objects to the record presented to this court. It presents the pleadings, and, as no evidence additional to that offered upon the trial of the original case was before the court, it is sufficient for a determination of the question before us. The judgment of the court is REVERSED.

RUDOLPH MOY, Appellant, v. EVA MOY, Administratrix of
the Estate of GUSTAVE MOY *et al.*

Partition Judgment: WHAT IS ADJUDICATED BY: *Accounting subsequent.* A decree partitioning real estate, fixing the interest of the parties, and ordering its sale, is an adjudication of such
1 matters, although no sale was had; but an accounting up to
2 date and the striking of a balance between the parties is justified in a subsequent action for partition.

SAME. A partition of real estate was had, and sale ordered, which sale was never made. In a subsequent suit for partition of the same property an accounting was decreed between the parties,
5 and items of expenditures and improvements made prior to the first decree were allowed. *Held, erroneous.*

Partition: ALLOWANCE FOR IMPROVEMENTS. One who claims property sought to be partitioned, as sole owner, should be allowed, on
5 partition, for all improvements made in good faith.

RECOVERY OF RENTS AND PROFITS. One seeking the partition of property in possession of defendant, claiming sole ownership,
6 cannot recover for rents, no evidence being given as to the rental value of the premises, or of any rent actually received of any considerable amount.

Appeal: REVIEW FOR PARTY NOT APPEALING. Where defendant in partition claimed sole ownership and former adjudication, and
3 judgment was found against her on the former branch of the case, from which she does not appeal, her claim cannot be considered on an appeal by plaintiff.

Appeal from Woodbury District Court.—HON. WILLIAM HUTCHINSON, Judge.

SATURDAY, APRIL 14, 1900.

ACTION in equity to partition certain real estate. The answer was a general denial, coupled with a plea of sole title, and also of former adjudication. From the decree rendered, plaintiff appeals.—*Affirmed.*

Lynn & Foley for appellant.

Geo. W. Argo for appellees.

WATERMAN, J.—In the year 1891, in an action for partition by the present plaintiff against the defendant Eva Moy and her husband, who was then living, a decree was rendered by the district court of Woodbury county fixing the interests of the respective parties in this real estate, and ordering its sale. No sale was ever had. This decree

1 is now pleaded by defendants as an adjudication.

There is no question but that it is such, and we think the court so treated it. The shares, as now confirmed, are the same as then fixed, but an accounting was had up
2 to the date of the present decree, and a balance struck as between the parties. This, we think, was justified.

Leach v. Association, 102 Iowa, 125.

II. Defendant claims sole ownership of the property under certain tax deeds and an execution sale. The trial court found against her on this branch of her case,
3 and, as she has not appealed, we can give the matter no further attention. It is true that in argument appellees claim to have taken an appeal, but we find in the record no evidence of their having done so.

III. The trial court, in accordance with the first decree, fixed plaintiff's share of the real estate at seven-fifteenths, and that of defendants at eight-fifteenths. Of this no complaint was made. But it also found that defendant Eva Moy had paid for taxes and improvements on the property the sum of three thousand five hundred and twenty-nine dollars and sixty cents; that plaintiff had paid for taxes and interest the sum of six hundred and two dollars and ninety cents, leaving a balance in the former's favor of two thousand nine hundred and twenty-six dollars and seventy cents, and this was made a first lien on the property, and ordered paid out of the proceeds of the sale. The remainder

was ordered distributed in the proportions stated above. To this part of the decree plaintiff excepts. Plaintiff, as we have said, secured a decree in partition in 1891. Presumably he was satisfied with it, for he did not appeal. It is questionable whether he is not estopped by his laches from excepting to expenditures made since, or from asking an accounting now. Part of the amount claimed to have
4 been paid by both parties antedates the first decree, and these payments seem to have been allowed by the court. The parties, in making up their account, should not have been permitted to go behind that decree. We are unable, from the record, to say just how far this was done. Taking the items as they appear, and plaintiff seems to have been allowed on these matters much more than
5 defendants, so he cannot justly complain. It is plaintiff's contention that defendants should have been allowed for improvements only what was needed to preserve the property, but this, we think, is not so where the improvements are made, as apparently they were here, in good faith. *Conrad v. Starr*, 50 Iowa, 470. Defendant Eva Moy claimed sole title to the property. It is true that her husband was defeated in an action to quiet title, based upon an interest acquired by him under foreclosure of a mortgage on the common property. *Moy v. Moy*, 89 Iowa, 511. But Eva Moy afterwards acquired a deed under a sale on execution against plaintiff's undivided interest. If the court found that her expenditures on the property were in good faith in the belief that she was the sole owner, we are not inclined to interfere. Another ground of complaint is that defendant was not required to account for the rents of the
6 property, she having been in possession. Plaintiff offered no evidence of the rental value of the premises. There is nothing in the record to show the actual receipt of any rents except one or two indefinite items of very small amount. We have no basis to go upon in making any allowance on this score. The account between the

parties as stated by the trial court seems to be warranted, and the decree is AFFIRMED.

LADD, J, took no part.

111	164
112	33
111	164
127	741
111	164
133	422
111	164
139	356

MACK EASTON, Guardian of ALICE KNOX, v. JOHN SOMERVILLE, Executor of the Estate of SARAH J. KNOX, Deceased, and E. A. RICHARDS, Appellants. ALICE KNOX, Intervener, Appellant.

Guardian and Ward: LACHES OF GUARDIAN. A guardian without authority of the court, purchased a note, secured by mortgage, with funds of her ward. At her death, her successor was appointed, who received interest on the mortgage from the assignor, and redeemed the land covered thereby from tax sale, without knowing that such purchase was made without authority. A short time after learning this, he brought action to rescind the investment, against the executor of the deceased guardian. The estate of said deceased guardian was solvent and unsettled, and no change had taken place in the relation of the parties, and no disadvantage had accrued. *Held*, that the guardian had not been guilty of such laches as would bar relief, although a little more than three years had elapsed.

WHEN NOT ACTIONABLE. Laches of a guardian in suing for rescission of an investment of his ward's property, made by a former guardian without authority of court, does not give the ward a right of action against him, when no damage has resulted and the judgment obtained in the suit is good and collectable.

Investment by Guardian: VALIDITY: Order of court. Under Code, section 3200, providing that guardians may lease lands, loan money, and in all other respects manage the affairs of their wards, under proper orders of court, an investment of the funds of the ward without an order of the court is voidable until approved by the court.

KNOWLEDGE OF WANT OF AUTHORITY: Trusts. There being sufficient evidence to show that one selling a note and mortgage to the guardian of a minor knew that he sold to her as such guardian, and received the money of her ward in payment thereof, he is presumed to know whether she had authority to sell, and he holds the money so received in trust for the benefit of the ward.

Election of Remedies: An action against a guardian for conversion; by buying a mortgage with funds of the ward without authority
3 from the court, and an action against one who received these funds with knowledge of such want of authority are not inconsistent, and hence work no election.

BY GUARDIAN. Election will not be found against a guardian, where
1 after knowledge of the facts he did nothing which evinced an election to ratify an unauthorized investment, but on the contrary disaffirmed same all he could, including the bringing of
10 a suit to disaffirm.

Same. As a guardian sues in a representative capacity and can do no
11 act binding on the estate of his ward without authority from the probate court, there is, without deciding the point, much reason for saying that he could not make an election binding on his ward.

Knowledge. It may be that as between himself and his ward a guardian will not be heard to say that he had no knowledge of the circumstances which established that an unauthorized investment had been made for the ward. But he rests under no
10 duty to one who sold the thing invested in. He, too, is a wrongdoer and cannot insist that the successor of the guardian who made the investment made an election, unless it appears that the acts claimed to evidence an intent to affirm by the said successor were done with knowledge of the truth.

NOTICE BY EXECUTOR: *Not presumed.* It not being proven that notice
7 was given by the executor, a claim against the estate will not be barred by limitations, which begin to run from the giving of the notice.

Rescission. A guardian bought a mortgage without authority. The seller and endorser paid \$80 interest to the successor of said guardian who then was ignorant of the facts. After learning the truth, he brought suit to rescind the investment in said mortgage without returning or offering to return said interest payment, but the amount was deducted from the judgment rendered against the seller of the mortgage and the mortgage
12 itself and the mortgage note delivered to the clerk for the use and benefit of the seller. *Held*, the deduction from said judgment sufficed for return or offer to return and the endorser is in no position to insist that the \$80 should have been returned before suit for rescission was brought, because, in paying it, he did not more than the law required.

Claims Against Estates: LIMITATIONS OF ACTIONS. Where a guardian invested funds of her ward in a note and mortgage without
1 authority of court, the statute limiting the time of filing claims

against the estate of one deceased does not apply to the filing of a claim for the amount of such mortgage with the executor of such guardian subsequently dying, because such claim was
6 contingent on the acceptance of the investment by the ward on coming of age, and also, because the ward was not a creditor of the estate of her said guardian until coming of age.

Pleading: LIMITATION OF ACTIONS. The bar of the statute of limitations relating to claims against the estate of a deceased person must be pleaded, if relied on.
5

Judgments: FORM. In a suit by a guardian seeking to declare invalid an investment made by his predecessor in which suit the ward intervened, it was ordered that he make a deposit with the clerk for the benefit of the ward and that upon so doing he be discharged and his bond exonerated, and it is intimated that
14 the validity of such a judgment might be objectionable were its form complained of.

Appeal: OBJECTION BELOW: *Misjoinder*. Objection to misjoinder of parties and causes of action cannot be made for the first time on appeal.
2

SAME: *Election of remedies*. Objection that plaintiff elected one remedy, and is estopped from pursuing another, cannot be made for the first time on appeal.
2

SAME: *Action improperly brought*. Objection that a cause of action against the estate of one deceased is not properly brought must be raised by motion or demurrer, and cannot be raised for the first time on appeal.
4

Appeal from Calhoun District Court.—HON. S. M. ELWOOD,
Judge.

SATURDAY, APRIL 14, 1900.

SARAH J. KNOX was at one time the guardian of Alice Knox, a minor. She received, as such guardian, one thousand and eight hundred dollars in money from her husband, who was the father of Alice Knox. One thousand dollars of this amount she invested without an order of court, in the purchase of a note, and real estate mortgage on Dakota land, from defendant Richards. Thereafter, Sarah J. Knox died, and John Somerville, defendant, was appointed executor. Plaintiff was thereupon appointed guardian for Alice Knox,

and as such received the note and mortgage purchased of Richards. Some time after his appointment he commenced this action against Richards and Somerville, executor, to recover the amount of his ward's money, invested in the Dakota mortgages. In the meantime the ward arrived at age, and she intervened in the action, asking judgment against plaintiff for his neglect of duty, and against defendants for the amount of money invested in the Dakota mortgage. The trial court rendered judgment in favor of plaintiff and against defendants for the sum of one thousand two hundred and twenty-five dollars and costs, and ordered him, plaintiff, to return the Dakota note and mortgage. An

1 accounting was also had between plaintiff and his ward, on intervener's petition, and the plaintiff was ordered to deposit a certain amount with the clerk of the courts for the benefit of intervener, and on so doing it was ordered that he be discharged, and his bond exonerated. Defendants and intervener appeal.—*Affirmed*.

J. C. Kerr for appellant Richards.

E. A. Walton for appellant Somerville.

M. R. & J. B. McCrary for appellant Alice Knox.

B. B. Foster and *Stevenson & Lavender* for appellee.

DEEMER, J.—Alice M. Knox is the adopted child of Charles H. and Sarah J. Knox. Her stepfather died in the year 1890, and her stepmother, Sarah J. Knox, was appointed guardian of her estate. In the year 1893 this guardian had the sum of one thousand eight hundred and fifty-one dollars in her hands, belonging to her ward.

1 In March of that year she, without authority or direction from the probate court, purchased from defendant Richards a note for the sum of one thousand dollars, secured by mortgage on some Dakota land, that had been

made to Richards by some parties named Moench. The note was indorsed to Sarah J. Knox as guardian. Mrs. Knox did not report her purchase to the probate court, as we understand it; but, if she did, her report was not approved. On February 4, 1894, Mrs. Knox died, and on April 26th of that year defendant John Somerville was appointed executor of her last will and testament. About February 10, 1894, plaintiff was appointed guardian of the person and property of Alice M. Knox, to succeed Mrs. Knox. Shortly thereafter he demanded and received from the executor, Somerville, the Moench note and mortgage, and included it in his inventory of property belonging to his ward. He also received eighty dollars in interest thereon from defendant Richards, which he reported to the court. He also redeemed the land covered by the mortgage from tax sale; but, as soon as he learned there had been no order of the court authorizing the investment of his ward's funds in the mortgage, he immediately collected the amount paid out in redemption from tax sale from the mortgagors, with interest. Alice M. Knox attained her majority June 17, 1896, and on October 15, 1897, plaintiff filed what he called his "final report," in which he referred to the Moench mortgage, and certain cash items received by him, amounting in all to one thousand five hundred and eighty dollars, as all the property and money coming into his hands belonging to his ward. In December of that year the ward filed objections to the report. Two supplemental reports were filed by the guardian. The court made an order that the guardian collect and bring into court, in cash, the funds belonging to his ward, at the October, 1897, term of court; and on December 13, 1897, plaintiff filed his petition in this case, in which he seeks to recover from Richards and Somerville, executor, the amount of money belonging to his ward that was invested by Mrs. Knox, as guardian, in the Moench mortgage; claiming that the former guardian had converted that amount of her estate, and that Richards had received the same, knowing it

was trust funds, and that he should account therefor. He tenders the note and mortgage to defendants, and asks judgment for the amount converted, with interest. By agreement of counsel, and with permission of the court, Alice M. Knox intervened; asking an accounting from her two guardians, and seeking to charge plaintiff with neglect and carelessness in the management of her property. The objections of Alice M. Knox to the reports of her guardian, Easton, were, by consent of parties, also brought into the case, to be considered and determined on the evidence adduced. Defendant Somerville, executor, denied the allegations of plaintiff's petition, but admitted he held, for the benefit of Alice M. Knox, certain sums bequeathed to her by the will of Sarah J. Knox. He also pleaded laches and negligence on the part of plaintiff, and an estoppel based on plaintiff's conduct with reference to the Moench mortgage. Defendant Richards denied the allegations of the petition, and also pleaded laches, negligence, and estoppel. In answer to the petition of intervention, various pleadings were filed, that need not at this time be referred to. Plaintiff, in answer, however, admitted having two hundred and ninety-two dollars and ninety cents in cash belonging to his ward, subject to deductions for expenses, etc., but denied all negligence in the management of her estate. The trial court, as we have stated, rendered judgment against defendants for the amount of money invested by Mrs. Knox, as guardian, in the Moench mortgage, with interest, less the sum of eighty dollars found to have been paid by Richards. It also found that plaintiff had in his hands a balance of one hundred and fifty-seven dollars and ninety-two cents belonging to his ward, which amount he was ordered to turn over to the clerk of the court for her benefit. It also found that the estate of Mrs. Knox was indebted to Alice M. Knox in the sum of four hundred and fifteen dollars and eighty cents, money in her hands at the time of her death, belonging to her said ward; and judgment for the amount was ordered

against Somerville, as executor, and he was ordered to pay the same to Alice M. Knox. All parties save plaintiff appeal.

Some preliminary questions will be settled before going to the main points: Somerville contends that there is a misjoinder of parties and of causes of action. This point does not seem to have been made in the court below, and
2 consequently cannot be considered on appeal. *Hines v. Horner*, 86 Iowa, 594; *Millen v. Railway Co.*, 63 Iowa, 680. Again, he argues that, by pursuing Richards, plaintiff elected his remedy, and cannot pursue the executor. This also seems to be presented for the first time in this
3 court. There is no issue that justifies any such contention. Moreover, plaintiff asked judgment against both defendants for the conversion of the funds belonging to his ward; and as the remedies against the receiver of the funds and the guardian, who unlawfully converted them, are not inconsistent, there was no election of either
4 rights or remedies. *Kearney Milling & Elevator Co. v. Union Pac. Ry. Co.*, 97 Iowa, 719. It is also contended that the district court had no jurisdiction of a cause of action, or claim against one deceased; that it should have been presented to the probate court. That question was not made in the trial court by motion or otherwise. The action was before the right judge, and in the right court, but the claim or petition was not entitled as in probate. The district court had jurisdiction. Defendant's remedy was by motion, or perhaps by demurrer; and, as he failed to exercise it, he cannot complain. *Bank v. Green*, 59 Iowa, 171; *Goodnow v. Wells*, 67 Iowa, 654; *Clough v. Ide*, 107 Iowa, 669. A suit in equity was the proper remedy, in the absence of objections on the part of the executor. *Bank v. Johnson*, 94 Iowa, 212; *In re Allgier*, 65 Cal. 228
5 (3 Pac. Rep. 849). Further, it is argued that the claim against the estate of Sarah Knox is barred by the statute of limitations relating to claims against estates.

If this defense had been pleaded, there would be much force in the argument. But it was not. The executor appeared by counsel, and filed voluminous pleadings, setting forth his various defenses, but at no place does he plead the statutory bar. In view of the manner in which the case was tried, it

seems that such a pleading was necessary, if reliance
6 was placed on such defense. Again, it may be well

doubted whether the statute relating to the time of filing claims has any application to the case. The investing of the money in the Moench mortgage without the authority of and direction of the court was, as we shall see, merely voidable. The ward, on arriving at age, might have elected to accept the mortgage. Had she done so, there would have been no liability on the part of the first guardian or of her estate. The claim then was, in a sense at least, contingent, and did not mature during the life of the first guardian. In such cases the statute does not apply. *Savery v. Sypher*, 39 Iowa, 675; *Wickham v. Hull*, 102 Iowa, 469; *Senat v. Findley*, 51 Iowa, 20. Moreover, the ward was not a creditor of Mrs. Knox. The relation of debtor and creditor did not exist between them until the minor became of age. *Humphreys v. Mattoon*, 43 Iowa, 556; *Thomas v. Pyne*, 55 Iowa, 348. Easton was not appointed guardian until after the death of Mrs. Knox, and he held no claim against her at the time of her death, and it may well be doubted whether the statute applies to him. See *In re Allgier*, 65 Cal. 228 (3 Pac. Rep. 849). The estate of Sarah J. Knox is solvent and unsettled, and no prejudice can result from the allowance of the claims of plaintiff and his ward. But concede that the statute relating to the filing of claims does apply, and

that it is not necessary to plead the statute; still it
7 does not appear that the claim is barred. The statute

began to run from the giving of notice by the executor. No evidence was adduced of the giving of such notice. True, we have an amended abstract, reciting that a certain proof of notice was filed in probate, but it does not appear

that this was offered in evidence, on the trial of the case. Judicial notice will not be taken of the fact that such a notice was given, and, in the absence of proof as to when the notice was given, we cannot say the claim is barred. *Johnson v. Barker*, 57 Iowa, 32; *Stewart v. Phenice*, 65 Iowa, 475; *McLeary v. Doran*, 79 Iowa, 213; *Pickering v. Weiting*, 47 Iowa, 242. *Brownell v. Williams*, 54 Iowa, 353, is not in point. There evidence as to the giving of notice was introduced, and considered by the court. In some states it is held that the statute does not begin to run until final settlement, and an order to pay over is made. *Marlow v. Lacy*, 68 Tex. 154 (2 S. W. Rep. 52). It is doubtful, however, if this is the rule in this state. *Wycoff v. Michael*, 95 Iowa, 559. Our conclusions on this branch of the case find some support in the following cases: *Robinson v. Robinson*, 22 Iowa, 427; *MacGregor v. MacGregor*, 9 Iowa, 65; *Cassedy v. Casey*, 58 Iowa, 326; *Sankey v. Cook*, 82 Iowa, 126; *Moore v. McKinley*, 60 Iowa, 367.

II. A guardian cannot, as at common law, loan his ward's money, or invest it in securities, without an order of court. His powers are conferred by statute, and he may loan their money, and in all other respects manage their affairs, under proper orders of the court, or a judge thereof. Code, section 3200. Under this section it has been held that a guardian cannot loan the money of his ward, lease his land, or invest his funds, without an order of court. *Bates v. Dunham*, 58 Iowa, 308; *McReynolds v. Anderson*, 69 Iowa, 208; *Slusher v. Hammond*, 94 Iowa, 512; *Reed v. Lane*, 96 Iowa, 454; *Garner v. Hendry*, 95 Iowa, 44; *Alexander v. Buffington*, 66 Iowa, 360; *Dohms v. Mann*, 76 Iowa, 724. Such transactions made without the order or direction of the probate court, are invalid, or voidable, at least, until approved by the proper court. As the investment in the Moench mortgage was not done on the order of the probate court, and as the same has never been approved, the estate of Sarah J. Knox is liable for the

amount of the funds so invested. *Garner v. Hendry, supra*. Although there is a dispute in the evidence, we are satisfied, that the defendant Richards knew when he disposed of the mortgage that he was selling it to Mrs. Knox as guardian, and that he received money belonging to her ward in payment thereof. He is presumed to have known that the guardian had no authority to make the purchase, and, under the circumstances, must be held to hold the money received in trust for the benefit of the ward. *Bates v. Dunham, supra*. But Richards and Somerville both plead that plaintiff, by his laches and conduct, is estopped from enforcing his claim. When plaintiff received the Moench note and mortgage from defendant Somerville, as executor, he had no actual knowledge of the fact that they had been purchased without the order of the probate court. Acting on the assumption that the proceedings were regular, he undertook to redeem the land from tax sale as hertofore stated, and also received from defendant Richards one installment of interest on the mortgage. As soon as he learned of the fact that the mortgage had been taken without authority, he demanded and received from the mortgagors the amount paid out by him in redemption, and within a short time commenced this action to rescind the investment, and recover the money advanced to Richards by the former guardian. He did not, however, tender the eighty dollars received from Richards, but the court deducted that amount from the sum found due the plaintiff. Defendants do not plead an election. Their defense is laches and estoppel. There was no such delay after plaintiff learned of the facts as to bar him of relief. If it be said that he was bound to take notice of the transaction of his predecessor, still there was no such delay as should bar plaintiff of his right to recover. No prejudice resulted to either defendant by reason of the delay. The delay was but little more than three years, and there has been no such change in the relations of the parties as will bar plaintiff of relief. Again, we are not prepared to say that

plaintiff could not wait until the ward became of age, to know whether or not she would ratify the transaction, before bringing his suit to set it aside. But, however this may be, we do not think the defense of laches is established. One of the essential elements of an estoppel is that the party pleading it should have so acted with reference to the conduct or representations of the other as that he would suffer damage if the one who is sought to be barred thereby were permitted to deny the truth thereof. *Byer v. Healy*, 84 Iowa, 7; *Tufts v. McClure Bros.*, 40 Iowa, 317; *Jamison v. Miller*, 64 Iowa, 402; *Wishard v. McNeill*, 85 Iowa, 474. There is no evidence whatever that either of the defendants have in any manner changed position, or done anything that would result in injury or damage if plaintiff is permitted to recover. If election were pleaded, or if it be treated as embraced in the plea of estoppel, yet we think the defense is not made out. To constitute an election, there must be knowledge of the facts, and some decisive act tending to show an intent to ratify the transaction, rather than to disapprove it. There is no evidence that plaintiff did anything, after knowledge of the facts under which the investment was made, and evinced an election to ratify. On the contrary, he disaffirmed it, so far as he could, and commenced this action. Without knowledge, there could be no election; and, while delay may be evidence of election, it is not conclusive. As to what constitutes an election, see *Richards v. Schriber, Conchar & Westphal Co.*, 98 Iowa, 422; *Kearney Milling & Elevator Co. v. Union Pac. Ry. Co.*, *supra*. As between plaintiff and his ward, it may be that he cannot be heard to say that he had no knowledge of the circumstances under which the investment was made; for it was his duty, as her guardian, to protect her interests. But as to these defendants no such obligation existed. They were wrongdoers and cannot be heard to say that plaintiff made an election, unless it appears that what he did, which

is said to be evidence of an intent to approve the investment, was done with knowledge of the facts. As
11 plaintiff sues in a representative capacity, and can do no act binding his ward's estate without authority from the probate court, there is much reason for saying that he could not make an election that would be binding on his ward. See *Cassedy v. Casey*, *supra*; *Lee v. Bank*, 108 Iowa, 716; *Hippee v. Pond*, 77 Iowa, 235. But, without deciding this point, we think it clear that no estoppel is proven. Moreover, there is no evidence that the note and mortgage are of any less value now than they were when purchased by Mrs. Knox. The investment of the money in redemption from tax sale has been fully accounted for, and the payment of the eighty dollars in interest was made by Richards, and
12 he (Richards) has had the full benefit thereof in the decree. No especial point is made on the failure of plaintiff to return or to offer to return the eighty dollars interest payment, and, as that matter is fully protected by the decree, there is no just cause for complaint. Defendant Richards is not in position to insist on a return of the money before the commencement of suit. In paying the eighty dollars he was doing no more than the law required. *Hendrickson v. Hendrickson*, 51 Iowa, 68; *Allerton v. Allerton*, 50 N. Y. 670; *Triggs v. Jones*, 46 Minn. 277 (38 N. W. Rep. 1113). The note and mortgage were delivered to the clerk of the court for the use and benefit of defendant Richards, and his rights thereto were fully protected.

III. Alice M. Knox also appeals from the decree. The allowance made to her has already been stated. Had plaintiff, as her guardian, invested her money in the Moench mortgage, there can be no doubt that she would be entitled to judgment against him for the amount thereof. As he
13 did not do so, his responsibility is for failure to take the necessary steps to protect her interests. That he did not bring suit against defendants as soon as he

ought may, for the purposes of the case, be conceded; but has the delay resulted in injury to his ward? His delay did not amount to a conversion of the property, and his liability must be predicated on negligence. Mere laches do not give the ward a right of action, unless damage results. The plaintiff now has judgment against defendants for the amount of the mortgage investment, with interest, and there is no suggestion that the judgment is not good. Had plaintiff proceeded, immediately on his appointment, to collect, he would have obtained no more than he has,—a judgment that seems to be good. If the judgment were uncollectible, a different question would arise. No complaint is made of the judgment in favor of intervener against the estate of Sarah J. Knox, and for the amount thereof plaintiff should have credit. Intervener also has judgment against plaintiff for the sum of one hundred and fifty-seven dollars and ninety-two cents. This was arrived at after an accounting made by the guardian, in which he was allowed certain credits for amounts paid the ward, or for her benefit, amounting to something over seven hundred dollars. He was also allowed one hundred dollars for services, and as compensation for his attorneys. The total amount allowed the intervener is something over two thousand six hundred dollars. This is more than one thousand eight hundred dollars received by her original guardian with six per cent. interest thereon, and intervener has no cause for complaint.

14. It is proper to say that the executor makes no complaint of the form of judgment entered against him, and we therefore express no opinion as to the validity thereof. The decree seems to be right, under the issues, and it is
AFFIRMED.

SARAH CHRISTIE V. THE IOWA LIFE INSURANCE COMPANY
et al., Appellants.

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116 28

Benefit Insurance: LACHES OF INSURER IN ASSESSING: *Relief in equity.*

1 When through no fault of the beneficiary an assessment under
the policy of a mutual life association has failed to produce
sufficient funds and enough would have been produced had the
5 assessment been made when it should, and as ordered in an-
other action, the beneficiary may have judgment in equity for
what he lost by failure to assess at the proper time.

INTEREST. Where a mutual benefit association failed to levy an
6 assessment for the payment of a death loss as provided in a
policy, interest should be allowed from the time of the breach.

Pleading: SUPPLEMENTAL PETITION. After a decree ordering an
assessment to be made on members of a mutual life associa-
tion to pay a policy has failed to produce sufficient funds, a
4 supplemental petition setting out the facts, and asking judg-
ment against the association was authorized by Code, section
3641, declaring that facts material to the issue, which have
happened since the filing of the former pleading may be set
up in a supplemental petition.

Same. Such supplemental petition was not invalid, in that it
stated the same cause of action as the original petition, since
4 it asked relief not given by the former decree and in so far as
it contained restatement of matter found in the original peti-
tion, it but set out a history of the litigation.

Judgments: WHEN FINDINGS BECOME ONE. A finding of facts, to-
gether with conclusions of law filed by a trial judge with the
2 clerk, is not a judgment, until actually spread on the court
records.

CONFLICT BETWEEN. Where a judgment does not coincide with the
3 views of the trial judge, as expressed in such a finding, it will
be presumed that the judge has changed his views, rather than
that the record is not right.

ADJUDICATION: *Decree left open.* A decree expressly continuing a
3 cause for such relief as might prove essential to the protection
of the plaintiff's rights was a final adjudication only as to the
issues decided.

Appeal from Blackhawk District Court.—HON. F. C. PLATT, Judge.

SATURDAY, APRIL 14, 1900.

ACTION on a certificate of a mutual insurance company. The case has been here twice before. 82 Iowa, 360, 104 Iowa, 707. Decree on supplemental petition as prayed, and defendant appeals.—*Affirmed.*

Alford & Gates for appellant.

Boies & Boies for appellee.

LADD, J.—This suit was begun July 27, 1894, and a decree entered at the September, 1895, term, directing an assessment of the members of the association at the date of Christie's death, September 7, 1886, at schedule rates, and ordering the payment to plaintiff of the proceeds thereof, "not exceeding \$2,500 and the interest thereon at six per cent. from the tenth of November, 1898 * * *

1 (such payment to be made within 60 days after the date of filing such decree)," and also ordering "that said cause stand continued for such other and further orders and proceedings as may be necessary hereon to protect and enforce the legal and equitable rights of the plaintiff." The decree, with the exception of the allowance of interest, and the rejection of judgments pleaded in the counterclaim, was approved by this court December 17, 1897, and *procedendo* filed in the district court April 1st, following. See *Pray v. Security Co.*, 104 Iowa, 117. On the eleventh day of June, 1898, the plaintiff filed a supplemental petition, reciting in detail the course of litigation, and alleging that the proceeds of an assessment had not been paid to plaintiff or the clerk of court; that the defendant had so changed its plan of business that indemnity was no longer raised by assessment; that it had a large amount of property subject

to execution; that had an assessment been made within three months after the proofs of loss were waived, December 20, 1886, at which time the levy of assessment was demanded of the proper officer and refused, the full amount of the certificate would have been realized; that unless judgment was rendered for the amount of the certificate, with interest, plaintiff would be remediless, and this relief was prayed. The answer averred that the former decree was final; that a proper assessment on all members in good standing, who were such September 7, 1886, had been made, and seventy-eight dollars and fifty-eight cents realized therefrom; denied that the full amount claimed would have been produced, had an assessment been made December 20, 1886; and imputed laches to plaintiff in not pressing her action until most of the certificates in defendant company had expired by lapse of time. It also declared that the supplemental petition contained no more than a restatement of issues adjudicated, and that it had been improperly filed.

I. The former decision was made in vacation, with an agreement that a decree might then be entered. The trial judge filed with the clerk a finding of facts, with his conclusions of law, ending with the direction that
2 judgment be entered. Whether this was sufficient in form as a decree need not be considered. It was never spread upon the records of court, and for this reason never became such. *Callanan v. Votruba*, 104 Iowa 672; *In re Weber*, 4 N. D. 119 (59 N. W. Rep. 523, 28 L. R. A. 621), and note. The record shows a decree which included
3 these findings and conclusions, and in no way inconsistent therewith. Even were it conceded not to follow the written directions of the judge, it must be treated, in the absence of any showing to the contrary, as truly evidencing the decision of the court; for a change in the views of the judge will be presumed, rather than that the record is other than a verity. As the cause, after ordering the assessments of members, was expressly continued for

such relief as might prove essential to the protection of plaintiff's rights, and the matters now involved were not determined, the decree was a final adjudication only as to the issues decided.

II. The practice of filing a supplemental petition in a case like this was approved in *Newman v. Association*, 76 Iowa, 65 (1 L. R. A. 659), where its necessity in order to reap the fruits of such litigation, is fully illustrated. Resort must be had in the first place to an action in mandamus to compel the levy of an assessment. *Bailey v. Association*, 71 Iowa, 691; *Rainsbarger v. Association*, 72 Iowa, 192, *Tobin v. Society*, 72 Iowa, 261. It was only after proceedings under the original decree had been exhausted that plaintiff was charged with knowledge of their failure, and given

the right to demand the more drastic remedy sought
4 in the supplemental petition. This was not a restatement of the issues, as contended by appellant, but, rather, a recital of the history of the litigation, together with the averments that but a trifling sum had been made available by that assessment under the decree; that defendant had ceased to raise indemnity by assessment in 1887; and that, had the assessment been levied on all members by the officers of the company within ninety days after proofs were waived, the full amount of the certificate would have been realized. These last two allegations were contained in the original petition, but the remedy granted in the decree was not based thereon. Code, section 3641, expressly declares that filing a supplemental petition shall not waive former pleadings. Restating them in the new pleading was a matter of convenience. All other averments were of matters transpiring after the beginning of the action, and properly came within the provision of the above section. The cause of action was the same as that originally stated. The relief only was necessarily different. Such a pleading is clearly within the statute permitting "facts material to the issue which have happened * * * since the filing

of the former pleading" to be stated in a supplemental petition. Code, section 3641. See *Leach v. Association*, 102 Iowa, 125; *Footte v. Light Co.*, 103 Iowa, 576.

III. The evidence shows that the defendant ceased to raise indemnity for losses by assessment in 1887, except on account of deaths prior to that time, and that had an assessment been levied when the officers, as held under the former decree, were obligated by the certificates to make it, enough would have been realized to fully satisfy plaintiff's claim. Only eighty-one dollars was realized from that of February, 1898. For some twelve years the association has failed and refused to perform its obligation under the certificate, and through this omission of its duty the benefits to be derived from the collection of assessments from its members have been lost. This has been through no fault of the plaintiff. If she has not been vigilant in pressing these suits, no obstacle has been thrown in defendant's pathway to impede the fulfillment of its agreement. No reason has been suggested why such a corporation should be relieved from the payment of damages directly resulting from the breach of its contract, and we can think of none. True, its membership has changed somewhat, but the company is the same distinct legal entity, with a different name. The law, of necessity, deals with the artificial person in such cases, and not with its constituent members. The decision in *Newman's Case* was not bottomed on the defiance of the court's order, but on the proposition that "damages flowing from a breach of contract must be borne by the wrongdoer, rather than by the innocent party." The language there used is especially applicable to the case at bar: "Some one should answer for any shrinkage in an assessment now to be made, on account of the delay. The party should suffer for it who is in the wrong, and the defendant is obviously that party. It should make good to the plaintiff what he has lost by its breach of its contract to make an assessment, collect the money, and pay it to the plaintiff. To require less, upon

the record made in this case, would be a license to natural persons to organize corporations as a cover for the grossest frauds."

IV. Interest computed on the amount of the certificate prior to December 20, 1886, was remitted, but appellant insists that no interest should be allowed previous to the entry of the decree ordering an assessment. We have
6 held that an assessment on members of a mutual benefit association must be levied in strict accordance with the terms of the contract (*Garretson v. Association*, 93 Iowa, 402), and also that when these are fixed at definite sums, and authorized in order to pay a specified indemnity, interest may not be added; *Pray v. Security Co.*, 104 Iowa, 117. This case determined what was necessary in order to comply with the contract, not the measure of damages resulting from its breach. Instead of denying interest on all claims for unliquidated damages, this court has uniformly held that "it may be considered, as an element of damage, under the rule which permits its allowance in order to arrive at the sum which will be a just and lawful compensation for the injury sustained." *Richmond v. Railway Co.*, 33 Iowa, 502. Thus, to the value of property lost or destroyed, interest from the time this happened is added, as part of the compensation. *Johnson v. Railway Co.*, 77 Iowa, 669; *Burdick v. Railway Co.*, 87 Iowa, 388; *Arthur v. Railway Co.*, 61 Iowa, 648; *Mote v. Railway Co.*, 27 Iowa, 27. This is on the ground that value can be ascertained, and when this has been done the owner is as plainly entitled to interest as he would be if a like sum had been payable in money. *Van Rensselaer v. Jewett*, 51 Am. Dec. 275, and note; *Selleck v. French*, 1 Conn. 32 (6 Am. Dec. 185). Here the amount which would have been raised by a timely assessment has been quite as certainly ascertained as the value of property might be, and all these years the plaintiff has been deprived of the use of a definite sum of money to which she was entitled. Compensation without interest would be in-

adequate, and we are of opinion that it should be included, not from the date of the decree or the beginning of the action, but from the time the money should have been paid under the terms of the contract. Niblack Mutual Benefit Societies (2d ed.), section 360; *Catholic Knights of America v. Franke*, 137 Ill. Sup. 118 (27 N. E. Rep. 86). See *German Sav. Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa, 530; *Hastings v. Insurance Co.*, 73 N. Y. 141.—
AFFIRMED.

THOMAS L. GREEN v. F. M. SMITH *et al.*, Appellants.

Mule Law: REVOCATION BY SIGNER OF CONSENT PETITION. Under Code, section 2450, providing that statements of consent to the sale of intoxicating liquors in a county shall be canvassed by the
3 board of supervisors after ten days' notice, and that its findings shall be effectual until revoked, a voter who has signed such statement can withdraw his consent after it is filed, and before it is acted on by the board.

APPEAL FROM ACTION OF BOARD OF SUPERVISORS: *Appearance of county attorney.* On an appeal by a citizen, under Code, section 2450,
1 to a district court, from a finding by a board of supervisors that a statement of consent to the sale of intoxicating liquors in the county is sufficient, it is proper for the county attorney to appear against the statement in the district court, and Code, section 2450, requires him to so appear.

JURY TRIAL ON APPEAL. An appeal to a district court from a finding
2 by a board of supervisors as to the sufficiency of a statement of consent to the sale of intoxicating liquors is not triable by a jury.

Appeal from Fayette District Court.—HON. L. E. FELLOWS,
Judge.

SATURDAY, APRIL 14, 1900.

On the first day of December, 1897, there was filed with the county auditor of Fayette county a statement of

111	183
0116	729

111	183
0123	474

111	183
0138	541

111	183
144	167

consent to the sale of intoxicating liquors in said county. At the January, 1898, session of the board of supervisors, this statement was canvassed, and a finding made by the board that it contained the names of more than sixty-five per cent. of the legal voters of the county who voted at the last preceding general election. Thereafter the plaintiff filed a general denial as to the sufficiency of the statement and the correctness of the board's finding, and an appeal was taken to the district court. It was there stipulated that the total number of votes, as shown by the poll lists of 1897, is five thousand five hundred and four, and the net number of signatures on the statement of consent was three thousand six hundred and twenty-one, being forty-three in excess of sixty-five per cent. of the total vote. It was also stipulated that before final action on the statement by the board of supervisors, seventy persons filed applications asking to have their names stricken from the statement, and not counted thereon. There was a trial to the court, and a finding that the names of the seventy persons above mentioned should not have been counted for the statement, and the statement was held insufficient. The defendants appeal.—*Affirmed.*

Ainsworth & Ainsworth, C. H. Quigley, Phillips & Whitney, and W. B. Ingersoll for appellants.

Hoyt & Hancock for appellee.

SHERWIN, J.—In the trial in the district court the county attorney was permitted to appear for the plaintiff, against the objection of the defendants, and this is the first error assigned. Section 2450 of the Code provides that, if the board shall find the statement sufficient, any citizen of the county may file a general denial as to the statement, and directs that the county attorney shall then cause a notice thereof to be served upon the persons filing the statement, and appear for the state upon the hearing before the dis-

strict court. It also makes it the duty of the county attorney to appear in the district court and defend the action of the board in case an appeal is taken from its finding that the statement is insufficient. The statute itself requires the county attorney to appear against the statement in all proceedings before the district court upon appeal, and the court rightly permitted him to do so.

II. The defendants demanded a trial by jury, and this the court refused,—as we think, properly. This is a special proceeding. In its inception there were no parties to it, either plaintiff or defendant. There was no private right to be protected or enforced, nor any private wrong to be prevented or redressed. It was an *ex parte* statement of consent to the sale of intoxicating liquors by any one who might comply with the law relating thereto. An appeal from the finding of the board of supervisors did not change its nature, notwithstanding the fact that interested persons were required to file a bond for the costs of a trial *de novo* in the district court. The statute in question does not require a trial by jury, and in such cases we have held that it is not an absolute right, and the general holding of this court has been against such trial in special proceedings. *Gilruth v. Gilruth*, 40 Iowa, 346; *Davis v. City of Clinton*, 55 Iowa, 549; *In re Bresee*, 82 Iowa, 573; *Gates v. Brooks*, 59 Iowa, 510; *Duffield v. Walden*, 102 Iowa, 676; *In re Bradley*, 108 Iowa, 476.

It is contended that, after a statement of consent has been filed with the auditor of the county, it becomes effective, and rights vest thereunder, and that no one can thereafter withdraw his consent. This construction cannot be given the statute, nor can this claim be sustained. Section 2450 provides that all statements of consent filed under the law “shall be publicly canvassed by the board of supervisors after ten days’ notice has been given of such intended canvass,” and “its finding as to the results shall be entered of record, and such finding shall be effectual for the purpose

herein contemplated until revoked." It is clear that it was the legislative intent that no bar should arise under this law until the statement of consent was adjudged sufficient, and that no possible right can vest until this matter has been determined. The filing of the statement in the auditor's office was the preliminary step required by the law to secure a hearing before the board of supervisors. Its filing was necessary to give the board jurisdiction, but conferred no right, except that of having its sufficiency determined. Nor does the law say that the board shall determine the sufficiency of the statement as it was when filed. The board has only to deal with it as it comes to it. When filed, if not at once after signing, it was beyond the control of the signer, and the only way open for him to reconsider his action was to appeal to the board, as was done in this case. Shall it be said that a person who voluntarily signs a general statement of this nature cannot, before action is taken thereon, withdraw his consent, and by proper written notice and request to the board annul his former act, when the very purpose of the statement before the board is to show that a certain per cent. of the voters of the county at that time consent to the sale of intoxicating liquors therein? This seems to us against reason and in direct antagonism to that freedom of individual action which is so universally recognized and sustained when not in conflict with public or private rights. To say that one may not withdraw his consent to a certain line of action before rights are acquired thereunder is not sound in principle, nor do we believe it is sustained by the authorities. The district court was right in excluding from the statement of consent the seventy signatures in question. *Dunham v. Fox*, 100 Iowa, 131; *La Londe v. Board*, 80 Wis. 380 (49 N. W. Rep. 960); *Slingerland v. Norton*, 59 Minn. 351 (61 N. W. Rep. 322); *State v. Board of Com'rs of Crow Wing County*, 71 Minn. 50 (73 N. W. Rep. 631); *Black v. Campbell*, 112 Ind. 122 (13 N. E. Rep. 409). This hold-

ing is not in conflict with *Loomis v. Bailey*, 45 Iowa, 400; nor with *Jamison v. Board*, 47 Iowa, 390. Both of these cases involved the question of counting names which appeared on both the petition and remonstrance in proceedings to locate county seats, and under the law they could only be counted on the remonstrance. The deduction of these names leaves the statement of consent insufficient as to number, and the trial court so held.

Other questions are presented by the record, but, as their consideration will not change the result, we do not discuss them. The judgment of the district court is **AFFIRMED**.

CENTRAL STATE BANK v. S. R. SPURLIN, Appellant.

Bills and Notes: NEGOTIABILITY: *Describing payee as "trustee."*

The addition of the word "trustee," following the name of a payee in a note, does not destroy its negotiability, as such word is *descriptio personae*.

BONA FIDE HOLDER: Notice. Where plaintiff, in purchasing a negotiable note for value before maturity, makes some inquiry as to the paper, his negligence in not ascertaining that the note was obtained by fraud and was without consideration will not charge him with notice, it being the undisputed evidence that plaintiff bought the note in the usual course of business, before due, for full value and without notice of any infirmity.

Appeal from Hardin District Court.—HON. D. R. HINDMAN, Judge.

SATURDAY, APRIL 14, 1900.

ACTION at law upon a promissory note. Defenses, fraud, and want of consideration, and that plaintiff is not an innocent holder. There was a jury trial, and from a verdict and judgment in plaintiff's favor defendant appeals.—*Affirmed.*

W. J. Moir and John Porter for appellant.

Albrook & Lundy and Wm. B. Brown for appellee.

WATERMAN, J.—The note sued on is in the following form: “\$250.00. Marshalltown, Iowa, May 27, 1896. Twelve months after date, for value received, I promise to pay to J. M. Fitzgerald, trustee, or order, two hundred and fifty dollars, payable at Marshalltown Bank, with interest at 6 per cent. per annum, payable annually, 6 per cent. on interest due, if action is commenced hereon, a reasonable attorney’s fees, and hereby consent that any justice of the peace may have jurisdiction on this note. [Signed] S. R. Spurlin.” The pivotal question to be determined is, was this note negotiable? When a conclusion is reached upon

this point, all of the other matters argued can be disposed of readily. The claim is that the payee of the note was not certain; that the word “trustee,” following his name, makes it evident that some person other than Fitzgerald was interested in the note, as payee, and because of this the negotiability of the instrument was destroyed. If the word “trustee” is to be construed as mere matter of description, then Fitzgerald would have a right of action on it in his own name, and its negotiability would not be affected. Mr. Daniel, in his work on Negotiable Instruments (volume 1, section 415), says: “If a note be payable to an individual, with the mere suffix of his official character, such suffix will be regarded as *descriptio personae*, and the individual is the payee.” This is universally admitted with relation to such words as “agent,” “president,” and “executor.” As to the title “cashier,” commercial usage has so altered the rule that the bank may sue thereon, and its possession of the note will, alone, be sufficient evidence of title. 1 Daniel Negotiable Instruments, section 1189. For some reason that to us does not seem quite clear, the authorities are not altogether in harmony as to the effect when

the word "trustee" is added to the payee's name. The use of the suffix "agent," or "executor" indicates, as well as the word "trustee," that some person other than the named payee is equitably interested in the proceeds of the note. So this reason is not sufficient for holding that negotiability is destroyed, and no other has been advanced or occurs to us. In a well-considered case the court of appeals of Tennessee, after noting the conflict of authority, thus concludes: "We take it, the decided weight of authority, and, it seems to us, of sound reason, supports the position that the addition of the word 'trustee' to the name of the payee of a note does not destroy its negotiability." *Fox v. Trust Co.*, 37 S. W. Rep. 1102. See, also, *Bush v. Packard*, 3 Har. (Del.) 385; *Downer v. Read*, 17 Minn. 493 (Gil. 470); *Binney v. Plumley*, 5 Vt. 500; *Pierce v. Robie*, 63 Am. Dec. 614. We are quite content to follow these holdings. The case of *Gordon v. Anderson*, 83 Iowa, 224, cited and relied upon by appellant, is not in conflict with this principle. In that case the note was made payable to "Chas. R. Whitesell et al." The payee there was undoubtedly rendered uncertain, for by its terms the legal title to the note was vested in others, unnamed, jointly with Whitesell.

II. This instrument was, for the reasons given, negotiable. The undisputed evidence shows that it was purchased by plaintiff bank in the usual course of business, before due, without notice of any infirmity, and that full value was paid therefor. It was shown that the bank made some inquiry as to the paper before purchasing. The claim is made that, had it inquired further, it would have learned that the note was obtained by fraud, and was without consideration. Without saying that the evidence does not show the bank to have been diligent in this respect, the rule is that mere negligence on the part of the purchaser is not sufficient to charge him with notice. *Lehman v. Press*, 106 Iowa, 389, and cases cited.

The uncontradicted evidence thus showing that plaintiff was a *bona fide* holder, the defenses offered could not be urged against it. The trial court would have been justified at the close of the testimony in ordering a verdict for plaintiff. This being true, we need not consider the many criticisms of the charge of the trial court; for the errors committed, if any, were without prejudice.—AFFIRMED.

111	190
133	176

111	190
141	509

BLACKHAWK COUNTY, Appellant, v. GEORGE E. SCOTT and MARY SCOTT.

Support of Insane Pauper: LIABILITY FOR: *Husband and wife.* Code, section 2297, declares that public support of insane persons shall not release relatives liable therefor, and that those *legally bound for the support of the patient* shall be responsible to the county for sums paid by it for hospital expenses of such insane persons. Section 3165 declares that a wife shall be liable for family expenses. *Held*, that since a wife was not generally liable for her husband's support, and keeping her husband in an insane hospital was not a family expense, she was not liable to the county therefor.

Appeal from Blackhawk District Court.—HON. F. C. PLATT, Judge.

SATURDAY, APRIL 14, 1900.

THIS is an action to recover the cost of support of defendant George E. Scott in the hospital for the insane at Independence, where for a time he was confined as a patient. The defendants are husband and wife. George E. Scott is without money or property, and it is sought to hold the wife for the expense of his keeping. The wife demurred to the petition. The demurrer was sustained, and plaintiff electing to stand on the pleadings, judgment was rendered against it for costs. It appeals.—*Affirmed.*

S. B. Reed for appellant.

Lake & Harmon for appellees.

WATERMAN, J.—The case, involving less than one hundred dollars, comes to us on a certificate of the trial judge. The time claimed for is from October 1, 1897, to April 1, 1898, and the question we have to determine is whether the wife is liable for such expense. We need not go into a history of the legislation on the subject of creating a liability over to the county for the cost of keeping at public expense a pauper insane patient who has relatives legally bound for his support, nor trace the changes that have been made from time to time in the statute; for we recognize that it is the purpose and intent, under section 2297 of the Code, to make the property of those liable for the support of a public insane patient responsible over to the county for hospital expenses. The provision of this section relating to the liability of relatives imposes it upon a class,—“those legally bound for the support” of the patient; and we have to determine in each instance whether the individual sought to be charged is a member of such class. Is the wife obligated by law for the support of her husband? If not, she is not within the class made liable. We do not think she is so bound. Certainly no such obligation rested upon her at common law, and the limit to which the statutes have gone in this direction is to charge her estate in his behalf for matters of family expense. We have held that treatment in a state hospital for the insane is not a part of such expense. *Delaware Co. v. McDonald*, 46 Iowa, 170. Nowhere in the statutes is the wife made liable for the support of her husband. Liberally as we have construed section 3165 in some individual instances, which imposes a liability for family expense, we are not inclined to say that she is made liable under it generally for her husband's maintenance and support. In so far only is the wife liable, as the matter of support is for the benefit of the family. In the *McDonald Case*,

cited above, we said: "The expenses of the treatment of an insane wife in a hospital for the insane provided by the state, it is contended, are a part of the family expense. But we are of the opinion that they cannot properly be so considered. The treatment, we think, is intended partly as a great charity towards the unfortunate subject, and partly as a protection and relief to society. The state reaches out its strong arm, and makes the insane its wards, regardless of the care which they may receive at home, or the wishes of those upon whom they are dependent for support." Maintaining the husband in an insane hospital is, then, a kind of support for which the wife is not responsible, under the only section which imposes upon her any liability for the husband's expenses. We speak of this to show that her liability for the support of her husband is not general, but is limited entirely to such matters as are of purely family benefit. *Fitzgerald v. McCarty*, 55 Iowa, 702. The policy of legislation which requires one, who has contributed in taxes to the support of the hospitals for the insane, to make full remuneration for care and treatment when calamity compels their use, is so doubtful in character that we do not care to aid it by construction, unless required by the manifest purpose and intent of the lawmakers. If it is the intent to subject the property of the wife to the payment of a claim of this kind, it should be clearly stated. —AFFIRMED.

111	192
134	470

O. H. PERKINS, Appellant, v. D. B. LYONS, W. F. STOTTS, NEW ENGLAND SYNDICATE and the VERMONT SYNDICATE, Defendants, and THE BRATTLEBORO SAVINGS BANK, Intervener and Appellee.

Attachment of Corporate Stock: TRANSFER: *Record.* Under Code 1873, section 1078, providing that transfers of corporate stock shall not be valid until entered on the books of the corporation,
 3 a transfer of stock is not valid, as against creditors having actual notice thereof, even in a case where the assignee re-

quested the proper corporate officer to record the transfer, but he failed so to do.

Reasonable effort to obtain. An assignee of corporate stock cannot, because he insisted that the transfer be made, insist that he exhausted all reasonable means to have the stock transferred
4 on the books of the corporation, as required, by Code 1873, when he was in the corporation's office, where the books were kept, and he could have seen the transfer made, the secretary of the corporation being willing to make it.

BOOKS KEPT OUT OF STATE. Under Code 1873, section 1078, requiring the books of a corporation to show all transfers of stock, and be kept subject to inspection, the transfer of stock in an Iowa
6 corporation is not valid, as against creditors, when made on the books of the corporation, kept in Boston, Mass., as the books are to be kept for inspection in the state.

STATUTES: *Retraactiveness.* Code 1873, section 1078, providing that a valid transfer of corporate stock must be made on the corporation's books, as amended by Acts Twenty-sixth General Assembly, chapter 81, providing that such a transfer as collateral security
5 is valid after notice to the secretary of the corporation, did not give any validity, as against creditors, to an unrecorded transfer of stock, as collateral security, made before the latter act was passed, as the act is not retroactive.

• **RECORD OF TRANSFER: *Sufficiency.*** Under Code 1873, section 1078,
1 requiring transfers of corporate stock to be made on the books of the corporation, a memorandum, made with a pencil on the
7 stub of the stock book, showing the parties, the stock transferred, and the nature of the transfer, is a sufficient record thereof.

Fraudulent Attachment: EVIDENCE HELD INSUFFICIENT. That an attachment was levied in fraud of creditors of the debtor cannot
2 be established by evidence of a general nature, and founded largely upon supposition.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

SATURDAY, APRIL 14, 1900.

ON the fourteenth day of September, 1896, this action was brought by the plaintiff against the defendants D. B. Lyons and W. F. Stotts upon certain notes. It was aided by attachment, and a levy was made upon stock issued to

D. B. Lyons by the New England Syndicate and the Vermont Syndicate; both corporations organized under the laws of this state, with their principal place of business in Des Moines. The defendants Lyons and Stotts are in
1 default. The Brattleboro Savings Bank intervened.

setting up the facts: That in August, 1895, it loaned to D. B. Lyons a large sum of money, and that to secure the payment of said loan he assigned and transferred to it fifty shares of stock of the New England Syndicate, which shares were evidenced by stock certificate No. 88 of said corporation. That this certificate was delivered to intervener about August 15, 1895, with the following indorsement thereon and has since remained in its possession: "For value received, I hereby transfer and assign to the Brattleboro Sav. Bank, as collateral security, the shares of stock within mentioned, and authorize the secretary of said syndicate to make the necessary entrance on the books of the company. Witness my hand this sixteenth day of August, 1895. D. B. Lyons. Witnessed by R. R. McCutcheon." That on June 23, 1896, intervener notified the New England Syndicate of the transfer to it of this stock, and demanded that the same be properly transferred on the books of said syndicate. That the following memorandum in writing was then attached to the stub of said certificate, where it has since remained: "June 23, 1896. Notice is hereby taken by the New England Syndicate that certificate No. 88, for 50 shares of its capital stock, has been assigned and transferred to the Brattleboro Savings Bank of Brattleboro, Vt., as collateral security for indebtedness of D. B. Lyons to said bank. Henry O. Cushman, Sec'y of N. E. Syndicate." The intervener further alleged that about November 24, 1892, it made a loan to D. B. Lyons, and took, as partial payment, security therefor, fifty-six shares of the capital stock of the Vermont Syndicate, evidenced by five certificates, which were at the time indorsed in blank by Mr. Lyons and delivered to intervener, and which have ever since been held by it; that about

the time of the delivery of the stock to the intervener,—before September 14, 1896,—the Vermont Syndicate was verbally notified of such delivery, and of the terms thereof; and that on the fifth day of May, 1896, its secretary was again notified of such transfer and delivery, and demand made that said transfer be noted upon the stock book of the syndicate. The stock described in the intervener's petition is the same stock that was levied upon under the plaintiff's writ of attachment, and upon motion of the intervener, the New England Syndicate and the Vermont Syndicate were made parties defendant, and the cause transferred to the equity side of the court for trial. A trial was had upon the merits, which resulted in a judgment awarding the fifty shares of stock in the New England Syndicate to the intervener, and the fifty-six shares in the Vermont Syndicate to the plaintiff. The plaintiff and the intervener both appeal. The plaintiff will be designated as the appellant and the intervener as the appellee.—*Affirmed.*

Guernsey & Granger for appellant.

Kinne, Hume & Bradshaw for appellee.

SHERWIN, J.—In addition to the issues set forth in the foregoing statement of the case, the intervener charged the plaintiff with actual knowledge of the transfer of the stock to it long before the commencement of this action, and charged that the attachment was issued and levied by agreement, collusion, and conspiracy entered into between the plaintiff and Mr. Lyons with the intent to steal away the intervener's stock.

I. The appellee's first contention is that the suit and writ of attachment were "devised" and "contrived" by the plaintiff and D. B. Lyons with the fraudulent intent and purpose to hinder, delay, and defraud the intervener in the collection of its debt. It is conceded by the appellant that an attachment issued for a fraudulent purpose may be void,

as well as a conveyance made for the same purpose. It clearly appears that immediately after the notice of attachment was served upon D. B. Lyons, he handed to Mr. Bradshaw, who was in waiting at his request, a deed of general assignment, which was at once recorded. It may be inferred from the evidence that Mr. Lyons, through his agent, Mr. Thompson, sought to give the plaintiff a preference over his general creditors, but the validity of the assignment
2 is not in issue in this case. The evidence relied upon by the appellee to sustain its contention that the attachment was fraudulent is of a general nature, and founded largely upon supposition, and does not furnish the satisfactory proof of fraud required by the law.

II. It is very strenuously urged by the intervener that the plaintiff had actual notice of the pledge of the stock in question to it prior to his levy thereon, and that the case of *Screen Co. v. Stodghill*, 103 Iowa, 437, should be overruled, and such notice be now held sufficient to defeat the
3 lien of plaintiff's attachment. It may well be questioned whether the evidence is sufficient to sustain this claim of actual notice. If actual notice were clearly proven, we are not convinced that we ought to overrule *Screen Co. v. Stodghill*, *supra*. Many things may be said in support of Mr. Justice Kinne's opinion in that case.

III. No entry or memorandum of the transfer of the Vermont Syndicate stock was ever made on its books, as required by section 1078, Code 1873, which is as follows: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by, and to whom transferred, the numbers, or other designation of the shares and the date of the transfer." At the annual
4 meeting of the stockholders of the Vermont Syndicate which was held in Des Moines in May, 1896, Mr. Harris, the then cashier of the intervener, was present; and he at that time notified the secretary of the Ver-

mont Syndicate that the Brattleboro Bank held certain of its certificates, issued to Mr. Lyons, as collateral security, and requested Mr. McCutcheon, the secretary, to make proper entry of such assignment on the syndicate's books, which Mr. McCutcheon agreed to do, but, as we have seen, did not. This is the substance of the conversation between Mr. Harris and Mr. McCutcheon on this question. The appellee contends that it exhausted all reasonable means to secure the proper transfer of this stock on the books of the Vermont Syndicate, and is consequently protected against the levy of plaintiff's attachment, notwithstanding the transfer had not been entered upon the corporate books. This contention we cannot sustain. The books of the corporation were in the secretary's office in Des Moines at the time of the conversation above given. They were within easy reach of the secretary and Mr. Harris. It would have taken but a moment to have secured them, and had the proper entry made under the eye of Mr. Harris himself. This the secretary was willing to do, and no question was made as to the right to have the transfer so entered; but Mr. Harris did nothing further in the matter, and Mr. McCutcheon, the secretary, testifies that he forgot it,—“just simply neglected it.” Mr. Harris was surely as much at fault for this failure on the part of Mr. McCutcheon as was Mr. McCutcheon. Mr. Harris did not then exhaust all reasonable means to have the transfer recorded, and his effort in this direction does not bring the appellee within the rule invoked in its aid. *Sargent v. Insurance Co.*, 8 Pick. 90; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454; *Colt v. Ives*, 31 Conn. 25; *Weber v. Bullock*, 19 Colo. Sup. 214 (35 Pac. Rep. 183). Chapter 81 of the Acts of the Twenty-sixth General Assembly amended section 1078 of the Code by adding thereto the following: “And provided further that when any shares of stock shall be transferred to any corporation as collateral security, such corporation may notify the secretary of the corporation whose stock is transferred as afore-

said, and from the time of such notice, and until notice that said stock shall have ceased to be held as collateral security, said stock so transferred and noticed as aforesaid shall be considered in law as transferred on the books of the corporation which issued said stock, without any actual transfer on the books of such corporation of such stock."

5 This amendment became law on the fourth day of July, 1896. Appellee insists that the notice to the syndicate in May of the same year was sufficient to bring this case within the terms of the statute after this enactment became a part thereof. To so hold would be to give the statute a retroactive effect. The act itself does not indicate such an intent on the part of the legislature, and no reason appears to us why we should so construe it. *Bartruff v. Remey*, 15 Iowa, 257; *Polk County v. Hierb*, 37 Iowa, 369; *McIntosh v. Kilbourne*, 37 Iowa, 420.

IV. The uncontradicted evidence shows that from some time prior to May, 1896, up to the time of the plaintiff's levy upon the New England certificate of stock No. 88, the stub of that certificate bore the following pencil
6 notation: "With Brattleboro S. B., as collateral."

At the time of the levy there was attached to said stub the memorandum in writing dated June 23, 1896, which is set out fully in the statement preceding this opinion. This was attached to the stub on the twenty-third day of June, 1896, in Boston, Mass., at the request of Mr. Harris. Prior to the stockholders' meeting of this syndicate in May, 1896, Mr. Treat was its secretary. His residence was in Des Moines, where he kept the stock book containing the stub in question. At the May meeting, 1896, Mr. Cushman was elected secretary. His home was in Boston, Mass. He returned to Boston soon after his election as secretary, and took the stock book with him, where it remained until after plaintiff's levy. This stock book was marked upon the inside of the cover, "Stock Certificate Book and Register of the New England Syndicate." The stub in question reads as

follows: "No. 88, for 50 shares. Issued to D. B. Lyons. Dated Aug. 16th, A. D. 1895." There also appeared on it the pencil notation which we have heretofore noticed. It is conceded by counsel for appellant that the memorandum of June 23, 1896, would have been a good transfer, under the rule announced in *Moore v. Opera-House Co.*, 81 Iowa, 45, if the stock book had been kept in the syndicate's office in Des Moines, but he contends that the memorandum placed upon a book kept in the state of Massachusetts did not operate as a transfer on the books, as against the plaintiff. There is great force in this position. One of the provisions of section 1078 of the Code reads as follows: "The books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares; and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same." This statute relates to corporations organized under the laws of this state, and doing business herein. It must have been the intention of the legislature to require the books of the corporation to be, also, kept where they could be inspected. It would be idle to require books to be kept as above provided, and then permit them to be kept in a distant state, one thousand five hundred miles from its principal place of business. In *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270, the court, in construing this same statute, said: "It is contended by the appellee that the provision for a record, designed to show who the stockholders are at any given time, is for the sole benefit of the corporation itself. But there is nothing in the provision that calls for such construction. Besides, nothing can be clearer than that the record is for the benefit of any one who may desire to inspect it, because it is expressly provided for such." We conclude, then, that this statute, by necessary implication, required the books of the corporation to be kept at its principal place of business in this state

(*State v. Milwaukee, L. S. & W. Ry Co.*, 45 Wis. 579), and that the memorandum attached thereto in Boston, Mass., did not, for this reason, furnish the record of the transfer required by the statute. We next come to the question of whether the pencil memorandum on the stub of the stock book was a sufficient transfer, under the statute. The stub itself showed to whom the stock had been originally issued, and the fact that it bore no other indorsement than the pencil one mentioned would indicate that it had been transferred by Mr. Lyons, the person to whom issued. The stub itself also gave the number of the shares. It appears from the record that the plaintiff knew Mr. Harris, and knew that he was the treasurer of the Brattleboro Savings Bank, and it is to be presumed that he knew where the bank was located. This being true, would not the pencil notation on the stub of the New England Syndicate stock book, "With Brattleboro S. B., as collateral," convey all the additional information required by the statute? Every requirement was present, except the date; and we do not think that was of great importance in this case, because the indorsement had been of long standing when the levy was made. We think the pencil notation a sufficient transfer, under the statute. *Moore v. Opera-House Co.*, 81 Iowa, 45. See, also, *American Nat. Bank v. Oriental Mills*, 17 R. I. 551 (23 Atl. Rep. 795), *Fisher v. Jones*, 82 Ala. 117 (3 South. Rep. 13); *Bank v. Cutler*, 52 Me. 509.

There was no error in trying the case in equity. The judgment of the district court is affirmed on both appeals.—
AFFIRMED.

NATIONAL LIFE INSURANCE COMPANY v. O. B. AYRES,
Appellant.

Mechanics' Liens: SEVERAL CONTRACTS. Where lumber is furnished
1 between November 18, 1895, and the following March, and a
note therefor is given on account, and a payment made thereon,

111	200
124	591
124	592

111	200
e128	7

111	200
142	531

and in the following May more lumber is furnished on a similar order and used on the same building, a separate statement for lien is made for it and it is made a separate cause of action on foreclosure, the two transactions are separate, and a notice of lien, filed within ninety days after the furnishing of the last item, is insufficient to establish a lien as to the first item.

"IMPROVEMENTS:" *What constitutes.* Lumber furnished for the purpose of building an office and putting in floors and ceiling, an office in the building, and putting in stairs and elevators, and erecting a shed behind the building, was furnished for "improvements," within Code, section 3089, giving a lien for lumber furnished for improvements on land.

SUBROGATION: *Priority.* Plaintiff furnished money for the payment of existing liens of record on certain property under an agreement with his borrower that the liens should not be canceled, but should be assigned to one L. to be held by him for the benefit of the loaner until a note and mortgage for the amount loaned was executed, and delivered to plaintiff. The mortgage so given was recorded June 18, 1896. A mechanic's lien on the property was not included in the mortgage, it not being of record, but was filed October 12, 1896. *Held*, that plaintiff was entitled to priority over the mechanic's lien of defendant, as, under the agreement, he was subrogated to the rights of the holders of said prior liens. *Association v. Scott*, 86 Iowa, 432, distinguished.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

SATURDAY, APRIL 14, 1900.

THIS is a contest as to priority between the plaintiff, as mortgagee of certain real estate, and the defendant, the holder of a sheriff's deed made in pursuance of a sale of the same property on foreclosure of mechanics' liens. Decree was rendered in favor of plaintiff. Defendant appeals.—*Affirmed.*

Ayres, Woodin & Ayres for appellant.

Geo. H. Lewis for appellee.

GIVEN, J.—I. The controversy rests upon the following facts, as we find them from the pleadings and evidence: S. N. Talcott purchased the property in question, a business property in the city of Des Moines, subject to a certain mortgage and other liens thereon, amounting to about fourteen thousand dollars, which he agreed to pay as part of the purchase price. Mr. Talcott desiring to use lumber for certain purposes on the property, verbally ordered a supply from Ewing & Jewett, which they furnished on the order, no other contract having been made than that which is implied from the order. Between November 18, 1895, and March 17, 1896, inclusive, lumber was furnished at various times, amounting to two hundred and ten dollars and ninety-
1 four cents. On April 7, 1896, Mr. Talcott executed his note to Ewing & Jewett for that amount on account of this lumber, and on June 9th following paid fifty dollars thereon. On October 12, 1896, Ewing & Jewett filed their statement for a mechanic's lien for the balance due on said lumber. Between May 27 and July 22, 1896, inclusive, Ewing & Jewett, on a like order, furnished more lumber to the amount of twenty-four dollars and seventy-six cents, which was used on said building, and on October 12, 1896, filed their other statement for a mechanic's lien therefor. Prior to June 18, 1896, Mr. Talcott applied to the plaintiff, through George H. Lewis, for a loan of twelve thousand dollars, to be secured by first mortgage on said property. We find that it was expressly agreed that the twelve thousand dollars and two thousand dollars which Mr. Talcott was to furnish should be used to take up existing liens appearing of record against the property, and that they should not be canceled, but should be assigned to Mr. Lewis, to be held by him for the plaintiff until the mortgage to secure the twelve thousand dollars was executed and delivered. The amount was furnished by plaintiff and by Mr. Talcott, and said existing liens as shown of record were thus taken up by Mr. Lewis. The liens of Ewing & Jewett,

not then being of record, were not included. On said eighteenth of June, 1896, Mr. Talcott executed and delivered to the plaintiff his note and mortgage for said twelve thousand dollars, which mortgage was immediately entered of record. March 24, 1897, Ewing & Jewett commenced action in two counts against S. N. Talcott for decree establishing and foreclosing said mechanics' liens. This plaintiff was not made a party to that action. Decree was rendered as prayed, and on May 15, 1897, the sheriff sold said property under said decree, to Ewing & Jewett, for two hundred and sixty-five dollars and fifty-eight cents, and on August 13, 1897, they assigned the sheriff's certificate to the defendant, Ayres, who thereafter received a sheriff's deed thereon. Plaintiff appealed, and moved to set aside decree and sale, to which Ayres made answer. Defendant Ayres also appeared, and was made a defendant in an action brought by the plaintiff against Mr. Talcott to foreclose its mortgage. The cases were consolidated, and disposed of as to all other parties and issues except between the plaintiff and defendant Ayres as to their claims of priority.

II. Two questions are presented for our consideration, namely, whether Ewing & Jewett were entitled to a mechanic's lien for all or any part of said accounts for lumber, and, if so entitled, then whether the plaintiff is entitled to priority over such lien by right of subrogation to the liens that existed under said prior incumbrances. Plaintiff contends that Ewing & Jewett were not entitled to mechanics' liens, for the reason that the lumber was not furnished "for any building, erection, or other improvement on land," as provided in section 3089 of the Code, but for repairs only of a building or erection. Mr. Talcott testifies: "It was for building an office, putting in floors and ceiling an office in the building I bought, and for putting in floor, ceilings, stairs, elevator, and a platform and shed out behind." Clearly, this lumber was not furnished merely for the purpose of replacing worn-out parts of the building, but

for the "improvement" of the building. It is argued that the repairs were not open and obvious, so as to give notice to third persons; and *Evans v. Tripp*, 35 Iowa, 371, is cited. The improvements were such that any person examining the building within the ninety days allowed for filing a lien would have been aware of them. We think Ewing & Jewett

statements were filed within the time required; and
3 this brings us to consider whether the two accounts and statements may be considered as one transaction.

Mr. Talcott's testimony tends to show that the improvements were contemplated at the same time, and that the lumber was furnished as he was able to progress with the improvements; but we think the manner in which the parties treated it shows otherwise. Evidently the improvement for which the first lumber was furnished was considered as complete; otherwise, that account would not have been closed by the note, as it was, nor made the subject of a separate statement for a lien, and a separate cause of action, when foreclosure was asked. We are satisfied that after that improvement was completed, Mr. Talcott concluded to make further improvements, and that the last lot of lumber furnished was not under the same order, nor for the same purpose, as the first. The last item furnished under the first order was on March 24, 1896, and statement for lien was filed October 12, 1896, over two hundred days after the last item was furnished. The evidence shows that said last item was furnished more than ninety days before the plaintiff paid out the twelve thousand dollars and took and recorded its mortgage, and that the plaintiff had no notice at that time of such a claim. We are of opinion that the first statement for a lien is not valid as against the plaintiff. The last item in the second count is July 22, 1896, and the statement was filed October 12, 1896, which was within the ninety days allowed for filing such claims, and therefore we conclude that this is a valid lien.

III. We now inquire whether the plaintiff is entitled to priority over this valid lien by right of subrogation. From the many authorities cited we understand it to be undisputed that the law is, that one who voluntarily pays a lien debt of another, or who merely furnishes the money to the lienholder to pay his debt, is not entitled to subrogation: but one who pays such a debt under compulsion, or to save himself from loss, or upon an agreement for subrogation.

4 is entitled to be subrogated to the rights of the lienholder. That a right to subrogation may arise from an agreement of the parties has been recognized by this court in *Barber v. Lyon*, 15 Iowa, 43; *Wormer v. Agricultural Works*, 62 Iowa, 699; *Weidner v. Thompson*, 69 Iowa, 36. We have seen that the plaintiff furnished the twelve thousand dollars to be applied in payment of the purchase price by taking up the liens of record thereon under an express agreement that said liens were not to be canceled by the holders thereof, but to be assigned and held for the benefit of the plaintiff, and that said liens were so taken up. We do not think it requires further argument or authorities to show that the plaintiff is entitled to subrogation, and therefore to priority over defendant's lien. Appellant's counsel seem to rely so explicitly on *Association v. Scott*, 86 Iowa.

432, that we notice the fact that in that case there was no agreement for subrogation, and that the conclusion is grounded in part, at least, upon the negligence of the plaintiff in not requiring a complete abstract of title, or examining the record. Counsel have discussed at length the question whether the plaintiff is entitled to subrogation by virtue of having paid the purchase price of the property, but, in view of the conclusion reached, we will not follow that discussion further than to refer to *Kaiser v. Lembeck*, 55 Iowa, 244. For the reasons stated, the judgment of the district court is AFFIRMED.

DAISY HALL, Appellant, v. MARY CARDELL, MINNIE RODDAN AND O. F. RODDAN.

Delivery: PRESUMPTION AS TO DATE. Delivery of a deed is presumed on the day of its date or acknowledgment.

To INFANT: Sufficiency. A deed by a father and mother to their infant daughter was on the date of its execution placed by the former in the child's lap, the mother taking the instrument to hold for the benefit of the daughter. The father testified that it was the intention of the parties that delivery to the mother should constitute delivery to the child. *Held*, a sufficient delivery.

To parent for infant. Parents, being by Code, section 3192, made the natural guardians of their children, may, as such guardians, accept the delivery of deeds made to them.

OF ACCEPTANCE BY INFANTS. Where a deed is made to an infant but a few weeks old, although it is not immediately beneficial, acceptance thereof is presumed and conclusively implied.

Revenue Stamp: PRESUMPTIONS. It is presumed that a deed properly recorded bore a revenue stamp, although such stamp is not shown by the record thereof.

VALIDITY. The want of a revenue stamp does not render invalid a deed executed on April 6, 1872.

Evidence: AGE OF CHILD. The positive testimony of a father as to the age of his daughter sufficiently proves the same.

LEAVES FROM FAMILY BIBLE. Leaves cut from a family Bible are admissible to prove the age of a daughter, the weight thereof to be determined by the court, although the entries therein were not made at the time of the birth of the child and were copied from another Bible.

DEEDS: Secondary evidence—foundation. Under Code, section 4630, providing that record evidence of a deed may be introduced when the original is shown to be lost, or not belonging to the party wishing to use the same or within his control, such evidence is admissible on proof that the party wishing to introduce the same had made careful search therefor, and failed to find it, and had heard that the deed was in the possession of a former attorney, who was in a distant state.

Suit to Redeem; RENTS AND PROFITS: Reversal and remand. In a suit to redeem from tax sale, where plaintiff offers to take a

111	206
121	38
122	549
111	206
130	462

111	206
142	651

111	206
144	78

decree setting aside the sale, without requiring defendants to
8 account for rents and profits, such decree will be entered and,
upon reversal resulting, it is proper for the supreme court to
order such decree, with permission to defendants to present
claim for improvements to the district court for allowance.

Appeal from Dallas District Court.—HON. A. W. WILKIN-
SON, Judge.

SATURDAY, APRIL 14, 1900.

SUIT in equity to redeem certain lands from tax sale.
From a decree dismissing the petition, plaintiff appeals.—
Reversed.

I. M. Earle for appellant.

Cardell & Giddings and *Shortley & Harpell* for appel-
lees.

DEEMER, J.—The land in controversy was sold for
taxes October 29, 1873, and a tax deed issued December 4,
1876. It is claimed that plaintiff is the owner of the land
through a deed made by her father and mother of
1 date April 6, 1872, acknowledged the same day,
and recorded January 12, 1891. Plaintiff's father,
John Hall, became the owner of the lot May 24, 1870, but
he did not record his deed until September 28, 1875. It is
claimed that plaintiff was born March 19, 1872. She com-
menced action to redeem March 17, 1891. If, as she claims,
she was a minor at the time of the tax sale and when the
deed issued, and if she was then the owner of the land, she
had, by statute, one year from the time she arrived at age
within which to redeem (Code, section 1439; Code 1873, sec-
tion 892); and her suit in equity is the proper method of en-
forcing that right (Code, section 1440).

Defendants say, however, that plaintiff has not estab-
lished her minority; that there is not sufficient proof of title
in plaintiff; that the deed, if one was made, was neither

delivered to, nor accepted by, plaintiff; and that, on the whole case, plaintiff is not entitled to recover. Plaintiff's father testified that she was born March 19, 1872, and he produced a leaf from the family Bible that gave that as the date of her birth. It is said that the father's testimony is based on the entry in the Bible, and that that entry is not admissible, because not made at the time of the birth of the child, and for the further reason that entries appearing thereon were copied from a large book into the one from which the leaves were cut. The record does not sustain this assumption. John Hall, the father, testified positively, and without equivocation, to the date of birth, and his testimony is not disputed. Concede, for the purpose of the case, that leaves torn from the Bible were inadmissible, yet there is no doubt as to the time of plaintiff's birth. We may say, however, that the leaves were admissible, their weight to be determined by the court. *Insurance Co. v. Pollard*, 94 Vt. 146 (26 S. E. Rep. 421, 36 L. R. A. 271); *People v. Slater*, 119 Cal. 620 (51 Pac. Rep. 957).

Plaintiff's father testified that he did not know where the original deed that he made to plaintiff was; that he had made careful search for it; that plaintiff had made search, and that he had looked through all his daughter's papers, and was unable to find it; and that he had heard the instrument was in the possession of a former attorney for plaintiff, who at the time of trial was in the state of California. A duly-certified copy of the deed made by the recorder of the county, was then offered and received in evidence. Defendant objected to it because secondary, the loss of the original not being shown. Under the statute (Code, section 4630), loss of the original need not be shown in order to justify the reception of certified copies of the record. Proof by the party, on oath or otherwise, that the original is not within his control, is sufficient. The authorities fully justify the admission of the secondary evidence. *Ingle v. Jones*, 43 Iowa, 286; *Corbin v. Beebee*, 36

Iowa, 341; *Olleman v. Kelgon*, 52 Iowa, 39; *McNichols v. Wilson*, 42 Iowa, 385.

But defendants say there is no evidence either of acceptance or of delivery of the deed. The presumption is that the deed was delivered on the day of its date or acknowledgment. *McGee v. Allison*, 94 Iowa, 531; *Farwell*
4 *v. Brick Co.*, 97 Iowa, 286 (35 L. R. A. 63); *Nichols v. Saddler*, 99 Iowa, 429. In addition to this, we have the direct evidence of plaintiff's father, to the effect that, after the deed was signed and acknowledged, he placed it in plaintiff's lap, and that his wife then took the instrument to hold for the benefit of the plaintiff; that it remained in the wife's possession until shortly before it was recorded; and that it was the intention of the signers that delivery to the mother should constitute a delivery of the deed for the benefit of plaintiff. Surely this, plus the presumption, shows a sufficient delivery. *Tallman v. Cook*, 39 Iowa, 402;
5 *Newton v. Bealer*, 41 Iowa, 339; *McKenna v. Kelso*, 52 Iowa, 727. Parents are the natural guardians of their children, and, as such, may accept the delivery of deeds made to them. Code, section 3192. The instant case differs essentially from *Richards v. Gray*, 85 Iowa, 149. There a deed was made by a grandfather to his grandson, who lived in another state. The deed was acknowledged by a justice of the peace, and held by the grantor. The grandfather testified that he delivered the deed to the justice in the name and for the sole benefit, in trust, of his grandson. Neither the grantee nor his parents knew anything about the deed, and it was never recorded. Arnold, the justice, returned it to the grandfather, who was the principal custodian of it thereafter. After the redelivery of the deed, the grandfather assumed control over the land, and entered
6 into negotiations for its sale. Again, it is said that, as the deed bore no revenue stamp, it was invalid, and conveyed no title. The presumption is that it bore a

stamp, and this presumption is not overcome by the record. *Collins v. Valleau*, 79 Iowa, 626. But, if it did not bear a stamp, it was not invalid, under the internal revenue law in force at the time of its execution. *Mitchell v. Insurance Co.*, 32 Iowa, 425.

Further, it is said there is no proof of acceptance by the minor. At the time the deed was delivered, plaintiff was but a few weeks old, and, of course, had not mental capacity either to dissent or accept. But it is the universal rule that when a beneficial instrument is made to an infant, presumption of assent obtains, and knowledge of the conveyance and of its delivery is not essential. *Cecil v. Beaver*, 28 Iowa, 246; *Tallman v. Coöke*, 39 Iowa, 402; *Newton v. Bealer*, 41 Iowa, 340; *Palmer v. Palmer*, 62 Iowa, 207. The conveyance of the property at the time it was made may not have conferred any great benefit on plaintiff, but it was certainly not prejudicial, and we think the law conclusively implies consent. *Byington v. Moore*, 62 Iowa, 470; *Davis v. Davis*, 92 Iowa, 147.

Various matters are called to our attention as reasons for not accepting the plaintiff's evidence. We have given consideration to all of these, but are not prepared to hold that plaintiff's evidence should be entirely discredited. Unless we do that, there must be a decree permitting plaintiff to redeem.

We are constrained to believe that she has established all the material allegations of her petition, and that she is entitled to the relief asked. On the question as to the amount she should pay, we are relieved of much difficulty. as she offers to take a decree setting aside the tax deed, and giving her possession of the land, without calling on the defendants for the rents and profits. As the evidence shows that they are, at least, equal to the amount plaintiff should pay, we are content to give her the decree she asks, without compelling her to advance anything or the

defendants to account. There is some evidence of improvement placed upon the lot, but it is not of such character as that we can arrive at any proper conclusion regarding the amount, if anything, to which defendants are entitled on account thereof.

As the case must be reversed, we remand it for a decree in harmony with this opinion, with permission to defendants to present their claims for improvements to the district court for such an allowance, if any, as they are entitled to. This proceeding seems to be justified by *Strabala v. Lewis*, 80 Iowa, 510.—REVERSED.

THE CITIZENS' NATIONAL BANK OF DAVENPORT, IOWA, v.
THE CITY NATIONAL BANK OF CLINTON, IOWA,
Appellant.

Adjudications: PARTY BROUGHT IN TO DEFEND: *Pleading.* The German Savings Bank drew its check on the Citizens' National Bank, making same payable to Q. His endorsement was forged, the forger presented it to and obtained its payment of the City Bank. This bank then endorsed the check for collection and forwarded it to said Citizens' National Bank. The drawee, by which it was paid. The drawee bank charged this amount to the account of the drawer, the said German Savings Bank. When the forgery was discovered, the drawer began suit against the drawee, the Citizens' National Bank, drawee, thereupon notified the City Bank to come in and defend. This it did both by filing a petition of intervention and having its attorney appear for the Citizens' National Bank; judgment was recovered against said Citizens National Bank and none entered against the said City Bank, intervener. Then the

1 Citizens' National Bank drawee, began suit to recover of said City Bank, which had paid the check on the forged endorsement, endorsed it to the plaintiff for collection and been repaid by it. Each party contends in this suit that the suit in which judgment was entered against the Citizens' National Bank and not entered against the City Bank was a complete adjudication of the liability of said City Bank. *Held*, while one liable over may be concluded by a judgment in a suit which he is duly requested to defend, it does not follow that a judgment

may therein be entered against the person so brought in. Ordinarily this may not be done, for though he have the right to appear and defend as a party he does not become such and is not liable to the plaintiff in the action. (b) Since then, no judgment could rightfully have been entered against the City Bank in the suit into which it was brought, the failure to enter there, judgment against it was not an adjudication that the Citizens' National Bank might not recover of the City Bank as for money paid an endorser who had acquired the paper
 2 paid by a forged endorsement. (c) The contention of the defendant that its pleading in the former case impliedly invoked jurisdiction of the court to enter judgment against it is not sustained by a showing that the petition of intervention asked that it might be made a defendant, answer, "and thus preserve its right to make full defense against all persons and claims which may be asserted against it in this litigation."
 (d) The City Bank is bound as to all defenses which were
 4 adjudicated in the suit into which it was brought and in which it intervened.

LIABILITY OF ENDORSER: *Pleading.* INDORSEMENT "FOR COLLECTION."

Where a bank which is neither drawer nor drawee pays a check
 4 upon a forged indorsement of the name of the payee and then endorses to the drawee bank, "for collection," which has funds of the drawer in its hands and pays said check upon presentation, the bank which endorsed "for collection" is liable to the
 3 drawee bank for which the latter has paid it, though drawee did not present the check to drawer for payment or certification to the genuineness of endorsements.

Appeal from Clinton District Court.—HON. P. B. WOLFE, Judge.

SATURDAY, APRIL 14, 1900.

ACTION by a drawee for money paid to an indorsee of a check, who acquired it on a forged indorsement of payee. The facts are fully stated in *German Sav. Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa, 531, where recovery was had by the drawer from drawee for money withheld because of such payment. The defendant appeals from judgment against it.—*Affirmed.*

Ellis & Ellis for appellant.

Cook & Dodge for appellee.

LADD, J.—Only such facts as are essential to a clear understanding of the points raised need be stated. The German Savings Bank drew its check for eight thousand dollars on the Citizens' National Bank, February 18, 1893, payable to William Quinlin. This was sent to McLaughlin, who presented it, with the indorsement of Quinlin forged, and his own written on the back, to the City National Bank, and received the money thereon. The latter then indorsed the check, "For collection account of City National Bank, of Clinton, Iowa, A. G. Smith, Cashier," and forwarded it to the Citizens' National Bank, by which it was paid. The forgery of Quinlin's name was not discovered until February, 1894, and on May 22d of that year the German Savings Bank began suit against the Citizens' National Bank for the amount it had charged the former in its account, owing to the payment of the check. The Citizens' National Bank, plaintiff herein, thereupon notified the City National Bank, the defendant in this action, to come in and defend, which it did, both by filing a petition of intervention, and by causing its attorneys to appear for the Citizens' National Bank. Judgment was recovered against this plaintiff in that action, but was not entered against this defendant, and each party now contends it to have been a complete adjudication of the liability of the City National Bank. The doctrine of *res adjudicata*, as applied to a case like this, was very clearly stated in *Littleton v. Richardson*, 34 N. H. 179 (66 Am. Dec. 759). "When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear, and defend the action, and has the same means and advantages of controverting the claim, as if he was the real and nominal party upon the record. In every case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive

against him, whether he has appeared or not, of every fact established by it." *McNamee v. Moreland*, 26 Iowa, 113; *Stoddard v. Thompson*, 31 Iowa, 80. The particular advantage of such a proceeding lies in the avoidance of twice litigating precisely the same issues. It does not follow, however, that judgment may be entered against the person so brought in. Ordinarily, this may not be done, for, though he have the right to appear, and defend as a party, he does not become such, and it is not liable to the plaintiff in the action. That this defendant was under no obligation to the German Savings Bank was expressly decided in the former action, where we said: "It cannot be doubted that when plaintiff [German Savings Bank] deposited its \$8,000 with the Citizens' National Bank it parted with the ownership of its money, and said Citizens' Bank became plaintiff's debtor to that amount. Therefore, in paying said \$8,000 to intervener [City National Bank] upon the faith of a forged indorsement, it paid its own money. Such being the fact, plaintiff would have no cause of action against the intervener." *German Sav. Bank, of Davenport, v. Citizens'*

Nat. Bank, 101 Iowa, 327. The only relief sought
2 was judgment against the Citizens' National Bank.

But appellant insists that its pleadings were of such a character as, impliedly, at least, to invoke the jurisdiction of the court to enter judgment against it. Without determining whether, if this were true, an omission to enter judgment against a party not liable would be an adjudication in its favor, it is enough to say such an inference is not to be drawn from the record. In its application for permission to intervene and its subsequent petition the defendant held strictly to its privilege of defending without being a party, as appears from the prayer of the former that it might be made a defendant, answer, "and thus preserve its rights to make full defense against all persons and claims which may be asserted against it in this litigation," and the ending of the latter asserting "that plaintiff cannot recover against said

defendant." True, the plaintiff might have canceled the charge against the savings bank, and brought its action against this defendant in the first instance, but it was not bound to do so, and might wait until its liability had been adjudicated; and the law, in its charity, will not allow the defendant, after having been vexed with that litigation, and put to expense, to relitigate the same issues in this action. As defendant was not a party in that suit, though permitted to defend as such, and no judgment against it might have been rendered, no reason exists for not permitting the plaintiff to maintain this action.

II. Notwithstanding its specific admission of responsibility over in the former action, the defendant now insists that its indorsement was restrictive, and carried no guaranty of the genuineness of the payee's signature on the back of the check. That an indorsement "for collection" passes no title to the indorsee is too well settled to call for discussion. *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553 (20 N. E. Rep. 193, 12 Am. St. Rep. 598, 2 L. R. A. 699); *Freeman's Nat. Bank v. National Tube-Works*, 151 Mass. 413 (24 N. E. Rep. 779, 21 Am. St. Rep. 461, 8 L. R. A. 43, and note); *Bank v. Hubbell*, 117 N. Y. 384 (22 N. E. Rep. 1031, 15 Am. St. Rep. 515; 7 L. R. A. 852; 3 Am. & Eng. Enc. Law, 815) *et seq.* Nor does it carry any guaranty of the genuineness of the check. *Bank v. Westcott*, 118 N. Y. 468 (23 N. E. Rep. 900); *Goetz v. Bank*, 119 U. S. 551 (7 Sup. Ct. Rep. 318, 30 L. Ed. 515). The indorser simply retains such title as it may have, and empowers the indorsee to act as its agent in obtaining the money. But the fact that it so forwarded the check had no tendency to show that it held the same other than as owner. *Cody v. Bank*, 55 Mich. 379 (21 N. W. Rep. 373); and it

3 did hold it under that claim. While the drawee, for reasons stated in *First Nat. Bank of Marshalltown v. Marshalltown State Bank*, 107 Iowa, 327, is bound, in the absence of fraud, to detect the forgery of the drawer's signa-

ture to a check or draft before payment, he is not charged with knowledge of the genuineness of any other signature on the instrument. This is evidently because of the superior advantages for investigation possessed by the indorsee. The latter acquires no title to a check or draft under a forged indorsement, and, the moment it is paid by the drawee, becomes liable as for money had and received. *First Nat. Bank of Chicago v. Northwestern Nat. Bank*, 152 Ill. 296 (38 N. E. Rep. 739, 43 Am. St. Rep. 253); *Marine Nat Bank v. National City Bank*, 59 N. Y. 67; *Vagliano v. Bank*, 23 Q. B. Div. 243; 4 Am. & Eng. Enc. Law, 502. But it must not be overlooked that in the case at bar the check was indorsed by the defendant to the drawee, and the words "for collection" meant nothing. Indeed, no indorsement at all was essential. The defendant is in no better position than it would have been had it demanded and received payment over the counter of the plaintiff's bank on this check to which it never obtained title. Had this been done, no one would say the money ought not to be restored. Appellant recognized this difficulty, and pleaded that plaintiff was instructed to present the check to the drawer for payment or for certification. Such an inference is not to be drawn from the form of the indorsement. That did no more than confer authority to collect from the party on whom the check was drawn. It would be the acme of absurdity to require a drawee of a check, with ample funds of the drawer, to present it to the latter for payment. Such a course would be contrary to the very purpose of the instrument's existence. Nor would a request for certification be any more availing. The drawer was not under the slightest obligation to investigate the genuineness of indorsements, and certify thereto. Had this been suggested, it would doubtless have declared the validity of the check irrespective of transfers, as was done in *Clews v. Bank*, 114 N. Y. App. 70 (20 N. E. Rep. 852), and *Espy v. Bank*, 18 Wall. 614 (21 L. Ed. 947). Novel would be the rule which would impose on a drawing

bank the burden of ascertaining at its peril, upon demand of any indorsee or drawee, the validity of all transfers under which any of these acquire a check or draft. That the duty of making such inquiry devolves on the transferee has been too often held to call for the citation of authority. Besides, it appeared in the former action that appellant had all the information the drawee could possibly have obtained upon such an inquiry upon the drawer.

III. True, the petition did not designate the payment of the check to the defendant a mistake, but it did state the facts as heretofore related, and these were expressly admitted

by the answer. To have denominated the payment

4 made under the mistaken supposition that defendant

had title to the check a mistake would have added

nothing to the pleading, save a conclusion of law. Conced-

ing, then, without deciding, that the issue as to whether lia-

bility of defendant ever might have been adjudicated in this

action, it was obviated by the clear admission of facts def-

initely fixing such liability. It is very evident that the

only defense available to defendant was that relied on in

the former action, and by that adjudication it is bound.—

AFFIRMED.

WATERMAN, J., takes no part.

S. A. BRUSH, Appellant, v. FRANK P. SMITH.

Expert Testimony: INSTRUCTING ON VALUE OF. Where veterinary

surgeons, in an action for the sale of diseased hogs, testified

respecting hog cholera, and that the conditions of the hogs in

4 question indicated that they had the disease, it was error to

instruct that expert evidence is made up largely of mere theory

and speculation, and that the law recognizes expert testimony

as the lowest order of evidence.

Pleading: COUNTS: *Practice.* Where one count of a petition was

based on a warranty that hogs were free from disease, and a

second count on false and fraudulent representations made to

111	217
114	536

111	217
d125	640

111	217
134	308

1 induce such sale, and the court charged that the measure of damages was the same on each count, it was not error to instruct that, if the jury found for plaintiff on one of the counts, he could not recover on the other, as the two causes of action grew out of the same transaction.

SAME: *Harmless error.* An erroneous instruction that plaintiff
2 could not recover on one count of a petition if a recovery was had on another count, was harmless, where the jury found for the defendant on one count, only.

Instructions: NEGLIGENCE. An instruction that plaintiff could not recover for loss to his own hogs, in an action for the sale of diseased hogs, if he negligently permitted the diseased hogs
3 to be mixed therewith, was not erroneous, as eliminating the question of the plaintiff's knowledge of the condition of the purchased hogs, as it is to be considered in determining his freedom from negligence.

Appeal from Poweshiek District Court.—HON. BEN MCCOY,
Judge.

SATURDAY, APRIL 14, 1900.

ACTION at law to recover damages for false and fraudulent representations and breach of warranty in the sale of hogs. There was a trial to jury, resulting in a verdict and judgment for defendant, and plaintiff appeals.—*Reversed.*

C. H. Washburn for appellant.

Scott & Reed and *S. R. Clute* for appellee.

DEEMER, J.—The petition is in two counts. In the first it is alleged that plaintiff purchased some hogs from defendant at a public sale, and that defendant warranted them to be free from disease; that the hogs were not as warranted, but were afflicted with cholera; that three of the hogs so purchased died of the disease; and that the sick hogs communicated the disease to other hogs of plaintiff that were theretofore sound and healthy, whereby he lost twenty more. Damages were asked for the value of the hogs so lost,

and consequential damages resulting from the sickness and death of all the animals. The second count is to recover the same damages for false and fraudulent representations in the sale of the animals. Defendant admits the sale, but denies that the hogs were diseased when he sold them. He further pleaded contributory negligence of plaintiff in placing the animals purchased at the sale with his own
1 healthy animals. In the ninth instruction given, the jury, the court said, in effect, that, if they found for plaintiff on the first count, there could be no recovery on the second, and, if they found for him on the second, there could be no recovery on the first. In the previous instruction the jury were told that the measure of damage was the same under either count. There was no error in this instruction. *Joy v. Bitzer*, 77 Iowa, 73 (3 L. R. A. 184). As the eight instruction is not objected to, the giving of the
2 ninth was manifestly correct, for the two causes of action grew out of the same transaction. But, if the instruction was not technically correct, no prejudice resulted; for the jury found that plaintiff was not entitled to recover on either count. *Fisk v. Railway Co.*, 83 Iowa, 255; *Mayne v. Bank*, 80 Iowa, 710.

II. In the eleventh instruction the court said "that if plaintiff, in taking the hogs in controversy among his own hogs, failed to use ordinary care in so doing, or negligently and carelessly permitted them to come in contact with and run with his well hogs, plaintiff cannot recover for loss by
3 reason of the infection of his hogs from the hogs in controversy, if so infected." This instruction is said to be erroneous because it eliminates the plaintiff's knowledge of the diseased character of the animals purchased of defendant. We do not think so. In order to determine the question of negligence or ordinary care, plaintiff's knowledge was, of necessity, an essential feature, and there is nothing that inhibits the jury from considering it. Moreover, in other

parts of the charge plaintiff's knowledge was made a material feature. In any event, the instruction was without prejudice, under the rules announced in the *Fisk* and *Mayne Cases*, *supra*.

III. Plaintiff produced two veterinarians who gave evidence respecting the disease known as "hog cholera," and who testified that the hogs plaintiff purchased were infected with the disease at the time of his purchase. After giving the usual instruction with reference to the value of expert evidence in general, the court concluded as follows:

4 *"It may be further remarked, too, in regard to evidence which is made up largely of mere theory and speculation, and which suggests mere probabilities, that it ought never to be allowed to overcome clear and well-established facts, and, further, that the law recognizes expert testimony as the lowest order of evidence."* The part italicized is objected to. That it announces the correct rule in a certain class of cases, as where the evidence relates to the genuineness of handwriting, is conceded. But it is argued that in the instant case it was erroneous. The right of the court to give cautionary instructions regarding such evidence is admitted, but it is claimed that it was error to instruct in this case that expert testimony is the lowest order of evidence. No doubt, this evidence, being merely the opinions of witnesses, should be received with caution; for it is well known that a witness testifying to an opinion is more likely to be mistaken than one who testifies to a fact. But, while it is to be received with caution, it is not always true that it is of little value, or the lowest order of evidence. In some cases it may be of great value, and of the highest character. *State v. Townsend*, 66 Iowa, 745; *Bever v. Spangler*, 93 Iowa, 605. The disease among animals denominated "cholera" is so well known and established, has been the subject of so much investigation by experts, and its symptoms and effects have become so well recognized by professional veterinarians, that we think evidence given by them.

based on proven facts, should not be disparaged as was done in this case. As said in *State v. Townsend, supra*: "In view of the peculiar character of the case, we do not think that medical evidence should be regarded as the lowest order of evidence. The attempt to grade the evidence was calculated to mislead the jury and the instructions cannot be sustained."

Some motions are submitted with the case. We need only say with reference thereto that they seem to be without merit. For the error pointed out, the judgment is REVERSED.

MARY OLVER *et al.*, Appellants, v. BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

Agreement to Maintain Bridge: DAMAGES. An agreement by a railway company with the owner of land on purchasing a right of way recited that such railway company would build a bridge on the line of its road, and furnish an undergrade crossing for plaintiff, to a spring on said land. Such passageway was built, and used by plaintiff and his predecessors for 26 years, when the bridge was replaced by another, leaving a narrower passage. *Held*, in an action for damages, that a refusal to instruct that if the passageway was narrow, so that it did not conform with the passageway theretofore used, plaintiff might recover, was not erroneous, since the agreement did not call for a passage of any particular width, and the new passage was ample for teams and stock.

Instructions: EQUIVALENTS. In a suit for damages against a railroad company for narrowing an undergrade passage to plaintiff's spring and damaging the spring, a refusal to instruct that if plaintiff had been in possession of the spring and passage for 26 years, to the notice of defendant, the latter was liable, is not error, where the court instructed that, if defendant had knowledge of plaintiff's rights at the time the spring and crossing were injured, plaintiff could recover.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

SATURDAY, APRIL 14, 1900.

PLAINTIFFS allege, as their cause of action, that they are owners by inheritance from their parents, Mary and William Olver, of the described sixty acres of land, upon which there was a valuable spring, used for household and farm purposes; that prior to May 4, 1870, the Burlington, Cedar Rapids & Minnesota Railway Company purchased of said Mary and William Olver a right of way across said

land, and, as a part of the consideration, agreed in
1 writing as follows: "Superintendent's Office. Bur-

lington, Cedar Rapids and Minnesota Railway Company. Cedar Rapids, Iowa, May 4, 1870. Mary Olver and Wm. Olver, Esq.: In consideration of our right of way purchase from you, the above-named railway company hereby proposes and agrees to place a bridge on its road, contiguous to your spring, in a way that shall save your spring, and enable you to gain access to it. Respectfully, yours, Geo. Green, President." They allege that said company did so construct its road as to place a bridge contiguous to said spring, with a passageway thereunder, and so as to preserve said spring; that in 1876 this defendant became the owner of said railroad, and at that time and ever since had full knowledge of the plaintiffs' rights to have said spring protected, and said bridge maintained so as to permit the passage of all kinds of loads from one part of the said farm to the other; that the defendant, recognizing their rights to have said bridge and spring so maintained and protected, did so maintain and protect them from the time it became the owner of the road up to August, 1896, when it removed said bridge, and wrongfully replaced it with another, so as to leave but a narrow passageway thereunder, and destroyed said spring by covering it with a large embankment, to the damage of the plaintiffs, wherefore they ask to recover two thousand dollars. The defendant answered, denying generally, and in an amendment avers that plaintiffs have a sufficient crossing; that the consideration for said right of way was two hundred and twenty-five dollars in hand paid,—

and sets out said right of way deed, and the deed by which the defendant became the owner of said railroad. Verdict and judgment were rendered in favor of the defendant. Plaintiffs appeal.—*Affirmed.*

Preston & Moffitt for appellants.

S. K. Tracy for appellee.

GIVEN, J.—I. The following facts are undisputed; Plaintiffs are the owners of the land as alleged. On the fourth day of May, 1870, Mary and William Olver received said writing, and they and the plaintiffs have ever since retained the same, without placing it on record. On the eighteenth day of May, 1870, they executed and delivered to said Burlington, Cedar Rapids & Minnesota Railway Company their deed, conveying to it a right of way one hundred feet wide over said land, which right of way included said spring, for the recited consideration of two hundred and twenty-five dollars in hand paid. The only condition contained in this deed is that if the railroad was not built within ten years, or if the track should be removed from said land, the land conveyed is to revert to the grantor, her heirs and assigns. Said deed contains no reservation or provisions as to the bridge or spring. Said Burlington, Cedar Rapids & Minnesota Railway Company, in constructing its road, put in a wooden bridge, of a sixteen-foot span, contiguous to said spring, which served as an undergrade crossing for persons, vehicles, and stock. The defendant purchased and received a conveyance of said railway under a decree of court on the twenty-sixth day of June, 1876, and has ever since owned and operated the same. In August, 1896, defendant removed said wooden bridge, and replaced it with one of iron, upon stone abutments, of a span of eight feet and ten inches. In filling in earth at one of the abutments, the defendant caused more or less earth to run over the place where the spring was located. After the conveyance of said right of way, the occupants of said farm

continuously used said passageway and spring up to the time that the new bridge was constructed. The issues are whether plaintiffs have a right to have said passageway maintained at the width at which it was formerly constructed, and to have said spring saved, and, if so, whether the defendant should be charged with knowledge of that right, and be bound thereby. It is also in issue as to whether the plaintiffs have been damaged. The only conflict in the evidence is as to whether shortening the width of the passageway damaged the plaintiffs in that particular, and whether the spring was injured or destroyed, to the plaintiff's damage.

II. Plaintiffs asked two instructions that were refused, and of this they complain. The first is to the effect that if the jury found that said written agreement of May 4, 1870, was a part of the consideration for the right of way, and that the grantors of said right of way and the plaintiffs had been in possession and actual use of the said
3 spring and the passageway under the bridge from 1870 to 1896, "then you are warranted in finding that the defendant herein, by reason of the possession of the plaintiffs, had notice of the rights of the plaintiffs to the use of said passageway, and the free, unobstructed use of said spring; and the defendant herein was bound, under such circumstances, to recognize the rights of the plaintiffs herein, and had no lawful right or authority to cover up said spring, or to narrow said passageway under said bridge, to the damage of the said plaintiffs." The court instructed, in effect, that if said agreement formed part of the consideration for the right of way, and if the grantors thereof and plaintiffs used said undercrossing and spring from 1870 to 1896, and that if in 1896 defendant destroyed the spring, and so rebuilt the undercrossing as to render it of little or no benefit to plaintiffs, "and you further find that defendant had knowledge of plaintiffs' rights therein at and before the time said spring and crossing were destroyed or injured, if you so find, then

plaintiffs will be entitled to recover," etc. The instruction refused makes possession and use of the spring and passageway sufficient evidence for finding that defendant had knowledge of plaintiffs' rights. The instruction given is to the same effect. It requires the jury to find the several facts named, including the use of the spring and passageway, and therefrom whether defendant had knowledge of plaintiff's rights. We say "therefrom," for there was no other evidence than those recited facts from which to find such knowledge. The agreement of May 4th had not been recorded, and there was no evidence that defendant had any knowledge of its existence. The instruction given is substantially the same as that asked. It is within the rule

announced in *Ague v. Seitsinger*, 85 Iowa, 300.

4 The other instruction refused is to the effect that if the defendant made the passageway "narrow, so that it did not conform with the passageway that had been theretofore held and used," and if the defendant filled up said spring, "then said acts of said defendant were wrongful and unlawful, and plaintiffs would be entitled to recover herein." The agreement was not to furnish a passage of any specific width, but one that would "enable you to gain access to it,"—the spring. The undisputed evidence is that the way under the new bridge is ample for the passage of teams and stock. There was no error in refusing to give the instructions asked.

Plaintiffs insist that the verdict is contrary to the evidence. Under the instructions, it was left to the jury to determine whether the defendant had knowledge that plaintiffs were claiming the rights they claim, and the question of damages. There was a conflict in the evidence as to the damages, which it was the province of the jury to settle; and it was for the jury to say whether, under all the facts proven, the defendant should be held to have had knowledge of the plaintiffs' claim to the passageway and spring. We

cannot say that the jury was not warranted in finding as it did. Complaint is made of two rulings in taking the testimony. They are upon purely technical grounds, and there was no prejudice resulting from the rulings.—AFFIRMED.

CHAUNCEY J. BLAIR, Appellant, v. CYRUS HEMPHILL *et al.*
(Two cases of same parties.)

Quieting Title: AGAINST LIENHOLDER. Under Code, section 4223, providing that the action of quieting title of real property may be brought against any person "claiming title thereto," an action to quiet title can be maintained against a mere lienholder.

ADJUDICATION. A decree in an action to quiet title rendered against a lienholder having the right to redeem from a prior incumbrance through which the plaintiff acquired title by foreclosure proceedings, constitutes a bar to the lienholder's right to maintain an action to redeem from such incumbrance.

CLOUD ON TITLE: *Equity jurisdiction.* A court of equity, in the absence of statute, has inherent power to remove a cloud from the title of real estate at the suit of one in possession.

Service of Notice: RETURN: *Affidavit.* That a notary public in writing the jurat to an affidavit of service of an original notice, utilized affiant's signature to the affidavit as a part of the jurat, does not render the proof of service defective.

Appeal from Adair District Court.—HON. JAMES D. GAMBLE and A. W. WILKINSON, Judges.

SATURDAY, APRIL 14, 1900.

ACTION in equity by a mortgagee to effect redemption from a prior mortgage which had been foreclosed. From a decree in defendants' favor, plaintiff appeals.—*Affirmed.*

H. E. Long for appellant.

John A. Storey for appellees.

WATERMAN, J.—These appeals are in the same case. In the first proceeding the appeal was taken from an order

sustaining a demurer to the reply. After this was done, the reply was amended by adding another division. A trial was then had on the merits, and plaintiff took a second appeal from an adverse decree. The controlling questions are the same in each case. Therefore we shall not attempt to distinguish the appeals further, in the course of what we have to say. The facts which give rise to the controversy are as follows. One Allie Clark being the owner of the land in question, mortgaged it on September 25, 1883, to James L. Lombard, to secure payment of the sum of five thousand dollars, with interest. This instrument was duly recorded. In October, 1886, Clark executed his promissory note to one C. B. Blair for the sum of ten thousand dollars. This note being guarantied by one Moore Conger, Clark executed to said guarantor a mortgage upon the land mentioned, to indemnify him. This mortgage, also properly recorded, is the one under which plaintiff is now asserting rights. The Polk County Savings Bank became the owner of the Lombard mortgage, and defendant Hemphill, through dealings with Clark, acquired an interest in the land. In March, 1889, the bank began foreclosure proceedings on its mortgage, but neither Moore Conger or plaintiff was made a party thereto. Plaintiff also began an action early in 1889 to foreclose his mortgage, and in this proceeding the bank was not made a party. In August, 1889, a decree of foreclosure was rendered in the action brought by the bank, and a decree foreclosing plaintiff's mortgage was also entered at the same time. A special execution was issued under both decrees on the same day. The real estate was duly sold under the writ issued on the decree in favor of the bank on October 8, 1889, and plaintiff's execution was returned unsatisfied. The bank was the purchaser at this sale, but the certificate was afterwards assigned to defendant Hemphill, to whom a deed issued October 9, 1890.

1 Thereafter Hemphill brought an action to quiet title against plaintiff, and a decree in his favor was

rendered January 13, 1894. On December 23, 1897, this action was brought by plaintiff to redeem from the Lombard mortgage on the ground that his rights as a junior incumbrancer had never been cut off. It is apparent from this statement that, if the decree in the action brought by Hemphill against plaintiff to quiet title is effective, the latter has no standing in court. Of the many matters discussed in argument, we need consider but two, which are in the nature of objections to this decree.

II. First it is said that an action to quiet title will not lie against a mere lienholder; that Hemphill, in order to protect his title against plaintiff's claim, should have brought an action to foreclose the latter's right of redemption. In support of this contention plaintiff cites two decisions of this court, the first of which was rendered under the Code of 1851, and the other under the revision of 1860. A glance will serve to show that, by the terms of these statutes, the action to quiet title was materially different from what it is now, and has been since the adoption of the Code of 1873. In *Fejervary v. Langer*, 9 Iowa, 159, the case went off on the ground that the judgment was by default, and there was no allegation in the petition that the claims of defendants were not superior to that of plaintiff. In the opinion, however, we find this very significant language: "It is not to be denied that the claimant may resort to a court of equity to extinguish the lien of a judgment, and to have his title in the land quieted against disturbance by the owner thereof." In *Eldridge v. Kuehl*, 27 Iowa, 160, while language is used, to the effect that an action to quiet title will not lie against a mere lienholder, we must look to the issues to determine what force and effect should be given such an expression. The statement of the issues in that case, as given by the court, is as follows: "Ordinary action for the recovery of real property. * * * Answer in denial; also, averring title in defendant by virtue of a tax deed; also, setting up and relying on the statute of

limitations." While it is true that the provision for proceedings to quiet title appears in the revision of 1860 under the general head of "Actions for the Recovery of Real Property," such action was specially provided for and regulated by sections 3602-3605 of that chapter; and it seems manifest, from the facts stated, that the action in the *Kuehl Case* was not brought under these sections. Indeed, it was in no respect equitable in its nature, for it was tried to a jury. But, if we were to concede that, under the Code of 1851 and the revision, this action would not lie, save against one claiming title, it does not follow that such is still the case. An action to quiet title is now an equitable proceeding in the nature of a remedy *quia timet*, and the rule is without exception that by bills of that character clouds of every description may be removed from titles. See cases cited in 17 Enc. Pl. & Prac. 277. Some force is claimed by appellant for the language of section 4223, which provides who may bring an action to quiet title. The section reads, "An action to determine and quiet the title of real property may be brought by any one, whether in or out of possession, having or claiming an interest therein against any person claiming title thereto though not in possession." It is argued that this expressly provides that the action can be brought only against one who claims title. This is a very narrow construction of a statute, giving an equitable remedy. But the following section shows, as we think, that the language quoted has no such restricted meaning. It provides that the petition shall pray that the defendant be barred and estopped from having or claiming "*any right*" adverse to plaintiff. Our attention has been called to no case in this court where the question here presented has been raised under the statute as we now have it. But we find a decision in which a plaintiff was awarded a decree against a mere lienholder. *Anderson v. Plow Co.*, 101 Iowa, 747. There the decree rendered quieted title against an apparent lien by attachment. So, also, in *Wood v. Brown*, 104 Iowa, 124, the ac-

tion was to quiet title against a mortgage lien; and plaintiff was not successful, so far as appears, only through failure to prove title on his part. Under statutes enacted with a similar purpose in other states, we find the decisions uniform in sustaining a plaintiff's right to thus remove a cloud. *Alt. v. Groff*, 65 Minn. 191 (68 N. W. Rep. 9); *Davenport v. Stephens*, 95 Wis. 456 (70 N. W. Rep. 661), and cases cited. There is another, and it seems to us an unquestionable, ground on which we might rest our holding that the

3 decree in the action to quiet title cut off plaintiff's right of redemption. A court of equity, in the absence of statute, has inherent power to remove a cloud from the title of real estate at the suit of one in possession. Story, Equity Jurisprudence, 826; *Cleland v. Casgrain*, 92 Mich. 139 (52 N. W. Rep. 460); *Corey v. Schuster*, 44 Neb. 269 (62 N. W. Rep. 470), and authorities cited. Although this proceeding were conceded to be improperly entitled, if the court found, as it must, that any claim or right of plaintiff should be cut off, and his apparent lien removed, it would be a valid and effective decree, irrespective of the statute. The manner in which the action was entitled would not affect the decree.

III. Another contention of plaintiff is that it does not appear that the original notice in the action to quiet title was ever served on him, and the district court therefore lacked jurisdiction to render any decree therein. Plaintiff was a resident of the city of Chicago, Ill., at the time that suit was instituted. He testified that he had no recollection of the service of notice upon him. An original notice is on file, purporting to have been served on plaintiff by one W. D. Norton, and Norton testifies that he did so serve it. The objection made to this notice by appellant is that there is no proper return of service; that such a return should be verified by affidavit and Norton's name is not signed to the purported affidavit, which appears thereon. Norton, who is a witness, testifies positively that he served the notice on

plaintiff, and swore to the return after affixing his signature to the affidavit. Passing the question as to what effect should be given the trial court's finding that notice was duly served, we shall look to the facts here, to see what warrant there is for the claim made by appellant that no proper return of service was made. We have first Norton's testimony that he signed the affidavit. The notice itself is before us, with the original return thereon, and an amended return by Norton attached thereto. We have
4 inspected this paper, and have no doubt of the utter groundlessness of plaintiff's claim. The return on the original notice is as follows (we reproduce its form as far as possible):

"State of Illinois—Cook County, S.S.

"I, W. D. Norton on oath say that this notice came into my hands 1893 and that I personally served the same on the within named Chauncey J. Blair by reading the same to him and delivering him a copy of the same in Chicago in Cook County, Illinois on the 17 day of Nov., 1893.

"Subscribed and sworn to before me by W. D. Norton this 17 day of Nov., 1893.

"J. H. Poage,

"N. P. in and for Cook County,

"Illinois."

Norton's name is in a manifestly different handwriting from that of the jurat. When we take Norton's evidence in connection with the appearance of this return, and the similarity of his signature with that on the amended return, we have no doubt but that he signed this affidavit, and that plaintiff's contention in this respect is founded only on the fact that the notary public, in writing the jurat, utilized the name of the affiant as a part thereof. Norton's name was a part of the affidavit, and not of the jurat. Omitting it from

the latter would not affect the validity of the affidavit. *Kirby v. Gates*, 71 Iowa, 100.

The proof of service was in proper form, the district court had jurisdiction of the action to quiet title, and the decree rendered was operative to cut off all right of plaintiff. This is sufficient to dispose of plaintiff's claim that he is not estopped in this proceeding by such decree, and it dispenses with any necessity for our considering the matters argued relating to the terms of redemption. Neither is it necessary, in view of our holding, for us to pass specifically on the motions filed.—AFFIRMED.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA
AT

111	233
133	498
111	233
135	169

DES MOINES, MAY TERM, A. D. 1900.

AND IN THE FIFTY-FOURTH YEAR OF THE STATE.

STATE OF IOWA V. JAMES CUNNINGHAM, Appellant.

Murder of Bastard: INDICTMENT: *Failure of proof and variance.* An indictment charged the murder of one James Cunningham, Hepp, omitting all other description of deceased. Defendant was convicted of the murder of an illegitimate born to James Cunningham and Ida Hepp. A motion to direct a verdict was overruled, one of the grounds being that there was no evidence that James Cunningham Hepp ever existed. *Held:*

- a. While it is true that a bastard bears the name of neither parent and the grand jury had no authority to give it a name combining that of its parents, yet the case is governed by Code, 5286, which provides that where certain offenses are "described in all other respects with sufficient certainty to identify the act, an erroneous allegation of the name of the person injured is not material."

- 2 b. Were the question open, some of the members of the court would construe this section to be inapplicable to cases where, like here, no description beyond the name given in the indictment is attempted of deceased.
- c. But the rule established is, that if an offense is charged in the indictment and from facts in evidence, the court is satisfied defendant was not misled, this warrants the conclusion that the act intended to be charged was sufficiently described or indicated.
- 2 d. Where the one injured is described by name alone, extrinsic facts may be considered in order to determine whether the act charged was so specifically pointed out as not to mislead the defendant.
- 4 e. Facts outside of the indictment may be considered in determining whether defendant understood the specific charge intended to be made.
- f. Defendant was not misled by the misnomer.
- 6 g. Under the circumstances it was not error for the court to instruct that the intention of the indictment was to charge the killing of the infant child of Ida Hepp, instead of leaving it to the jury whether the nameless infant was the person whom defendant was charged with killing.

Murder: EVIDENCE: Review of verdict. Defendant, the father of an illegitimate, accompanied its mother to a place where they were strangers and where she gave birth to the child. On returning home with the child, about two weeks thereafter, early in March, they wrapped it in a shawl, and on the way they went from one depot to another at a certain place to make a transfer. Defendant procured a buggy, and drove by an unfrequented road to the other depot, where the mother alighted, leaving the child with defendant, and it was not seen alive thereafter. He then drove towards the fair grounds, and a witness saw the same team there about the same time. The infant's dead body was found in a good state of preservation two weeks after, near the fair grounds and identified. It lay on the ground, and had wounds on its person sufficient to have caused death. Defendant had time to drive to where it was found, and return and take the train with its mother, which he did. When he returned the team he took from his buggy a shawl, and, a short time after, an infant's robe was found in the manger in front of the horses. Up to leaving the depot with the child, defendant denied none of the facts established, but claimed to have driven back into town and delivered it to a woman from a distant city, under a pre-arrangement with her. But this woman was not seen by any one.

Though the testimony was conflicting, there was expert evidence that the body could, without decomposing, have lain where it did from when defendant was last seen with it until it was found. There was other evidence to show that it must have been alive later than the day in question, but it was inconclusive and doubtful. There was also evidence of an admission of guilt by defendant. *Held*, to amply support a conviction.

Harmless Error: Defendant claimed that he could not have committed a murder as early as charged because the body would
11 in that event have shown greater decay when found. Under these circumstances, it did not harm defendant to let the State show that a doctor produced by it, and who testified on the progress of decomposition, had obtained his experience with bodies treated with a preserving compound.

SAME. Assuming it to be charged by the court that if the jury
7 found murder was not done on the day charged in the indictment, there must be substantive evidence that the killing was done on a different day, every circumstance pointing to motive and intent may be considered with relation to any particular date on which an alleged crime may have been committed and evidence of circumstances showing motive, intent, and opportunity to commit infanticide, and of an admission of guilt, warrants a conviction, though the jury may determine that the killing was not done on the day charged.

INCLUDED OFFENSES: *Killing of infant.* In a prosecution for murder
8 in the first degree, where no one witnessed the killing, the victim being an infant, the court properly submitted the included offenses of murder in the second degree and man-
9 slaughter, warranted under the facts which might have fairly been found, but no offense lower than manslaughter could have been committed.

INSTRUCTION ON GOOD CHARACTER. In a prosecution for infanticide an instruction that, if the jury found defendant guilty, evidence as to his humane and kindly disposition towards children
10 constitutes an ingredient to be considered in passing on the grade of his offense, without reference to the apparently conclusive or inconclusive character of the other evidence, and that the jury were to consider this evidence throughout their deliberations, and give it such weight as they thought it justly entitled to, was proper, and did not limit the jury in their consideration of such evidence.

Appeal from Audubon District Court.—HON. WALTER I. SMITH, Judge.

TUESDAY, MAY 8, 1900.

THE indictment charges murder in the first degree. From a judgment of conviction entered on a verdict of guilty, defendant appeals.—*Affirmed.*

B. I. Salinger and J. H. Mosier for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

WATERMAN, J.—Defendant was tried for the killing of an illegitimate male infant born to one Ida Hepp, and begotten by him. The child was twelve days old on the alleged date of the killing. It had no name until the grand jury saw fit to give it one made up of the names of its parents. The indictment is in two counts, the same in form. The first charges the killing to have been done with a blunt instrument; the other, with the hands and feet of defendant. As a material question presented relates to the form of the indictment, we set out the first count:

1 “The said James Cunningham and Arthur Palmer on the 5th day of March, A. D. 1898, in the county of Audubon and state of Iowa, as aforesaid, upon the body of one James Cunningham Hepp, then and there being, willfully, feloniously, deliberately, premeditatedly, and of their malice aforethought, and with the specific intent to kill, did commit an assault with a deadly weapon, being a blunt instrument, a more particular description of which is to this grand jury unknown, and then and there held in the hand of said James Cunningham, and then and there the said James Cunningham did, with the specific intent to kill and murder as aforesaid the said James Cunningham Hepp, willfully, feloniously, premeditatedly, and of his malice

aforethought, strike the said James Cunningham Hepp in and upon the body of him, the said James Cunningham Hepp, with said dangerous and deadly weapon, thereby willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, inflicting in and upon the body and head of the said James Cunningham Hepp mortal wounds, of which mortal wounds inflicted as aforesaid the said James Cunningham Hepp, in the county of Audubon and state of Iowa, then and there did die. And the grand jury aforesaid upon their oaths do say, present, and find that the said James Cunningham and Arthur Pakmer then and there, in the manner and form aforesaid, willfully, feloniously, premeditatedly, and of their malice aforethought, did kill and murder the said James Cunningham Hepp, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Iowa." At the close of the evidence for the state a directed verdict of not guilty was asked on the ground that it was not shown that James Cunningham Hepp had ever lived or been killed. The same question was also presented by motion after verdict. We have, then, to consider the validity of this indictment as a support for the prosecution of defendant for killing a nameless infant. A bastard child has no name until it has acquired one by reputation or baptism. See cases collected in 3 Am. & Eng. Enc. Law, 890. At common law, in a proceeding like the one we have here, a conviction could not have been had on an indictment such as this. A misnomer of the party injured was fatal. Roscoe Criminal Evidence, 131; Archbold Criminal Pleading, 31. We turn, then, to the statute, to see what change has been effected in the common-law rule. Section 5286 of the Code is as follows: "When an offense involves the commission of or an attempt to commit an injury to person or property, and is described in all other respects with sufficient certainty to identify the act, an erroneous allegation of the name of the person injured or at-

tempted to be injured is not material." Were the question an open one, some of us would construe this section to mean that an error in the name of the party injured is not material, when such person is otherwise described or pointed out in the indictment. There was no other description here made or attempted of the person killed, than by the name given. But the question is not a new one in this state.

Discussion has been foreclosed by decisions of this
2 court. We understand the rule to be that if an offense is charged in the indictment, and from facts in evidence the court is satisfied that defendant was not misled, this is enough to warrant the conclusion that the act intended to be charged was sufficiently described or indicated. We need not review all the cases in which this court has undertaken to construe section 5286. In some of them the question of its meaning was not involved, as in *State v. Emeigh*, 18 Iowa, 122, where it appears there was no misnomer, and *State v. Ean*, 90 Iowa, 534, where the allegation in the indictment was that the name of the woman with whom defendant was charged to have committed adultery was to the grand jury unknown. In some other cases the language of the indictment is not reported, and we are unable to say whether the injured person was identified other than by name. See *State v. Windahl*, 95 Iowa, 471; *State v. Flynn*, 42 Iowa, 164; *State v. Carnagy*, 106 Iowa, 483. In still another class of cases the facts stated, other than the name, tend to point out the injured person,—as, for instance, in *State v. Hall*, 97 Iowa, 400, the indictment charges a larceny of property in the possession of the receivers of the Union Pacific Railway; naming one of them as Oliver W. Mink, whose true name was Oliver W. Ames. It will be seen at a glance that the injured person is also described as one of the receivers of the railway. See, also, *State v. Semotan*, 85 Iowa, 57; *State v. Franks*, 64 Iowa, 39; *State v. Porter*, 97 Iowa, 450; *State v. Cunningham*, 21 Iowa, 433. *State v. Windahl*, *supra*, may also be cited under this

head for there was evidence that the person injured was known to some people by the name given in the indictment. But we find other cases in which the indictment, in terms, does not describe the injured party save by name, and where it is held that extrinsic facts may be considered in order to determine whether the act charged was so specifically pointed out as not to mislead the defendant. When in the trial court this fact is so determined, we pass on appeal upon that as upon any other fact. In *State v. Crawford*, 66 Iowa, 318, the indictment charged an assault with intent to kill one Jesse Cameron. The true name of the party upon whom the assault was made was Jesse Walker Cannon. Defendant moved in arrest of judgment on the ground of this misnomer. After quoting the section in question, this court, speaking through Rothrock, J., said: "This provision of the statute would, of itself, seem to authorize the overruling of the motion in 'arrest' of judgment upon this ground. There is no showing that the defendant was in any way misled by the misnomer. On the contrary, the record shows quite conclusively that the defendant was not in any way prejudiced by the mistake in the indictment. The facts are that he shot at Jesse Cannon with a revolver, and wounded him in the arm and back; was arrested, confined in jail, and had a preliminary examination; and it does not appear that he shot at any other person at or about the time charged in the indictment." In the case at bar, defendant had been arrested, had a preliminary examination, and knew that he was charged with the killing of this infant child. In *State v. Carr*, 43 Iowa, 418, the charge was the robbery of one John Shattick by taking of the property of "John Shattick from the person and against the will of said John Kopek." As matter of fact, the name of the person robbed was neither Shattick nor Kopek, but Shoppick. The court instructed the jury that the mistake in the name was immaterial, unless they

should find that defendants were misled thereby. This instruction was objected to, and we approved it.

4 This is a direct holding that facts outside the indictment may be considered in determining whether the defendant understood the specific charge intended to be made. We are convinced that the defendant here was in no way misled by the misnomer, and he cannot, therefore, be permitted to take advantage of it.

II. It is strenuously claimed that the evidence does not support the verdict. The testimony established or tended to establish the following facts: Defendant and Ida Hepp reside in the northern part of Audubon county. They
.5 were unmarried, and had been keeping company together. As a result of illicit intercourse had, she became pregnant, and, being near her confinement in February, 1898, both she and defendant determined that she should seek some place to give birth to her child, where neither of them was known. On February 19th defendant appeared at a hotel in Atlantic, Cass county, and engaged lodging and board for himself and Ida Hepp; representing her as his wife. He told the landlord he was on his way with his wife to Nebraska, and he thought she was going to be sick. They were given accommodations, and on the twenty-first the child (a boy) was born. Cunningham did not register, but tried to keep his identity secret. The suspicion of the landlord was finally roused. He asked Cunningham to register, and, in the talk that ensued, the latter told his story. He said they belonged to respectable families, and the girl's shame was almost killing her; that he had spent forty-seven dollars in trying to get rid of the child. The child, when born, had a harelip, and an unnatural condition of the genital organs made circumcision necessary. This was performed. On March 5th Cunningham and the girl left on the train of the Rock Island Railway for Audubon, carrying the child wrapped in a shawl which he had purchased for the purpose. They reached Audubon at 8:45

A. M., intending to take a train on the Northwestern Railway for their homes, which left that morning at 10 A. M. On arriving at Audubon, Cunningham left the girl and child in the Rock Island Depot, went up into the town, procured a team and top buggy, returned to the depot, got Miss Hepp and the baby, and drove by an unfrequented road to the Northwestern Depot, where the girl alighted, leaving the baby with Cunningham, who drove away. Cunningham, after leaving the depot, went towards the fair grounds. A witness saw the team driven by him on the fair grounds early in March, but could not fix the precise date. The dead body of the infant, which was identified by the peculiarities we have mentioned, was found on the nineteenth day of March following, about twenty rods north of the fair grounds, lying on the surface of the ground, partially covered with weeds. There were contused wounds upon its person that were sufficient to have caused death. Cunningham had time to drive to the place where the body was found, and return to the depot and take the train for the north with Miss Hepp, as he in fact did. The child was not seen after Cunningham took it away in the buggy until it was found dead. When Cunningham returned the team to the stable, he took from the buggy a shawl, and, a short time after, an infant's robe was found in the manger in front of the horses. To present as clearly as possible the points sought to be made by the defense, we turn now to the testimony of Cunningham: Save the statement as to his attempt to get rid of the infant, he denies nothing of the facts set out up to the time of leaving the Northwestern Depot in Audubon with it. He claims to have driven back into town and given the child to a woman, who was to care for it. He says he first met this woman, a stranger, on February 3d, in the streets of Manning. She accosted him, and asked that he get her a pint of whiskey; told him that she was from Omaha. They were together about an hour, and he made arrangements for

her to take the child when it should be born. He had an understanding with her, reached through subsequent correspondence, to meet him in Audubon on March 5th and take the child. He says he saw her when he went to get the team, and arranged to deliver the child on the street, and that this was done. It is remarkable, to say the least, that the child should be taken from the shawl in which it was wrapped when given to this woman, and more remarkable still that its dress should have been retained by Cunningham, and left in the livery barn with the horses. He claims to have paid the woman forty dollars for taking the child. How long she was to keep it, or what she was to do with it, other than generally to care for it, was not mentioned between them. The woman was in no house in Audubon; seen by no person there save Cunningham. That the jury had good reason to regard her as a mythical personage is clear, without further argument. But it is said that Cunningham is corroborated to this extent: That it is made clear that the child was not killed on the fifth day of March, and that defendant established an alibi as to the time thereafter up to the date when the body was found. We may dispose of this alibi, by saying that the evidence was in conflict, and the jury might properly have found against it. We return to a consideration of the question whether the evidence can sustain a finding that the child was killed on March 5th. Its body was found, as we have said, in a good state of preservation, on March 19th. The temperature of the atmosphere and condition of weather during this interval were shown, and, taking these facts into consideration, together with the exposure of the body, and its condition when found, a number of physicians testified on the part of defendant that the remains would have decomposed in much less than two weeks. They differ greatly in the time they fix when decomposition would set in,—twenty-four hours to five days,—but they agree that it could not have lain there two weeks.

An expert introduced by the state testified that, under the conditions that existed, the body might have been exposed from the fifth to the nineteenth without decomposing. This witness was a physician of extended experience, had conducted a dissecting room in a large city for seventeen years, and had special facilities for noting the decomposition of human dead bodies. The facts, too, would seem to corroborate this witness. Under the body of the infant, when found, was a layer of ice, which would help to keep the flesh from decay. The jury had a right to accept the testimony of this witness, and base their finding thereon. But it is said that the umbilical cord was healed when the body was found; that it does not heal perfectly in less than twenty-five days, and the operation of healing ceases at death. The testimony does not show that the navel cord of this child was perfectly healed when found. Dr. Childs, who made the post mortem, says it "was healed so far as I noticed." That is all the testimony on the subject. If the child died on March 5th, it was then thirteen days old, and in that time the cord would heal to a considerable extent. Still another reason given why the death could not have occurred on March 5th is that rigor mortis set in after the body was discovered, and this could not have taken place so long after death. Dr. Childs testified that when the body was found it was limp and flexible. The child was buried the day it was found,—Saturday,—and exhumed the following Monday. Dr. Childs says that when the corpse was taken up, stiffness had set in. He does not say what this stiffness was, or what caused it. We are not able to say it was rigor mortis. When we add to the facts stated the additional one that there is evidence of an admission by defendant that he killed the child, it will appear there is ample support in the testimony for the verdict.

III. The court instructed the jury that the intention was to charge in the indictment the killing of the infant;

child of Ida Hepp. Objection is made that the court had no right to assume this fact. It may well be that it was for the jury to say whether the nameless infant was the person whom defendant was charged with killing, but there was no conflict here, and no room for doubt. The evidence was irresistible that this was the fact. No prejudice resulted to defendant from the instruction. It is not prejudicial error for the court to assume a fact about which there is no dispute. *State v. Huff*, 76 Iowa, 203. If the case of *Mead v. State*, 26 Ohio St. 505, is meant to announce a different rule, it is not in accord with the weight of modern authority. See *People v. Gallagher*, 75 Mich. 512 (42 N. W. Rep. 1063); *Bynon v. State*, 117 Ala. 80 (23 South. Rep. 640); *Wiborg v. U. S.*, 163 U. S. 632 (16 Sup. Ct. Rep. 1127, 41 L. Ed. 289); *People v. Phillips*, 70 Cal. 61 (11 Pac. Rep. 493); *Hanrahan v. People*, 91 Ill. 142; *Hawkins v. State*, 136 Ind. 630 (36 N. E. Rep. 419). Indeed, we think our holding that the indictment is sufficient settles this point against defendant. The ninth paragraph of the charge is also challenged. It is quite lengthy. We shall not set it out. It is sufficient to say that we have carefully examined it in view of the criticisms made, and discover no error. It is very fully and carefully drawn, and states accurately the effect that should be given such circumstances as tend to show that defendant killed the child on March 5th, if the jury find from all the evidence that it was not killed until a later date, and also the necessity for there being some evidence in addition to such circumstances, in order to find the killing to have been done after March 5th. It is said there is no evidence, independent of that which points to the killing on March 5th, which goes to show that defendant committed the crime thereafter, and that this instruction made it necessary that there should be such other evidence, in order to convict. Every circumstance pointing to motive and intent could be considered with relation to any particular date.

These, with the evidence of opportunity at a later time, and the admission made by defendant, would warrant a finding of guilty, even if the jury determined that the killing was not done on the fifth day of March.

IV. Exception is also taken to the action of the court in submitting to the jury the included offenses of murder in the second degree and manslaughter. The verdict here was

of murder in the second degree. Where the evidence
8. establishes that a defendant is either guilty of the crime charged, or not guilty, the trial court need not submit included offenses. *State v. Caten*, 100 Iowa, 501.

But we cannot say that is the case here. The act of killing was witnessed by no person. Whether it was premeditated and deliberate, or done in a moment of desperation or passion, is a matter of inference only. In such a case we think it is wise to do as the trial court did here,

submit every grade of offense which would be warranted under the facts which might fairly be found.
9

If any crime was perpetrated, this child was feloniously killed. Therefore there could be no offense below manslaughter committed.

V. The following instruction given is likewise excepted to by defendant: "Defendant has introduced evidence as to his character as a man of humane and kindly disposition

towards children. In passing on the question of
10 his guilt or innocence, and, if you find him guilty,

in passing on the grade of his offense, this evidence as to his character constitutes an ingredient to be considered by you, without reference to the apparently conclusive or inconclusive character of the other evidence; and it is for you to consider this evidence throughout your deliberations on the facts of the case, and give it such weight as you think it justly entitled to." Defendant seems to think this instruction limited the jury in their consideration of the character evidence. We do not see any warrant for such a construction. The law as stated is in harmony

with the decisions of this court. *State v. Gustafson*, 50 Iowa, 194.

VI. We have examined carefully the objections made to the testimony, and upon which claims of error are predicated, and conclude that no prejudicial ruling was made. As an instance of the character of these matters, Dr. Childs, a witness for the state, testified to experience at the dissecting table, and as to the length of time corpses were kept for the purpose of dissection. He was
 11 asked by the state whether a preserving fluid was not injected into such bodies, that tended to keep them from decomposing. This was objected to by defendant. The answer was that such a fluid was used. Manifestly, this fact was in defendant's favor, and, if erroneously admitted, could have caused no prejudice. We shall let the general statement made dispose of the other matters of this kind.

The motion to tax to the state the cost of the additional abstract filed at its instance will be overruled.—AFFIRMED.

STATE OF IOWA v. J. H. ENGLE, Appellant.

111 246
126 295

Embezzlement: AGENT TO SELL LANDS *Termination of agency.* Defendant, a real estate dealer, secured a power of attorney to sell a customer's land for him and a deed to same, with the grantee left blank. He filled in the name of an employe, who executed a mortgage to the customer, and also deeded him certain Nebraska lands, recording the deed, but never actually delivering it to the customer, and later conveyed the equity to the defendant, who sold it. The customer afterwards made several offers to sell the Nebraska land, and refused to mortgage it, saying he wished to keep it clear. *Held*, that the transaction was voidable, and not void, and that the customer had by his actions ratified the same, that thus, the relation of principal and agent had been terminated, that by this ratification, the agent became owner of the land and, hence, defendant was not guilty of embezzlement in refusing to account for the proceeds of the sale of the equity in the customer's lands.

Appeal from Clay District Court.—HON. F. H. HELSELL,
Judge.

TUESDAY, MAY 8, 1900.

THE defendant was convicted of the crime of embezzlement, and appeals.—*Reversed.*

THE facts upon which the conviction is based are substantially as follows: The defendant, Engle, was a real-estate agent, residing in Spencer, Iowa. In December, 1897, the prosecuting witness herein, Henry F. L. Brooks, listed with Engle, for sale, or to trade for land near Spencer, his farm in Dickinson county, Iowa. The selling price was to be thirty dollars per acre. There was talk between the two at that time that it might not be possible to make a cash sale at once, and Engle said that exchanges could often be made so as to realize the price on the second deal, if not on the first. Soon after this, Engle notified Brooks of an opportunity to trade his farm to one Smith for a stock of goods. Brooks looked the Smith stock over, and told Engle to see what he could do with it. Following this conversation, Engle informed Brooks of an opportunity to trade for a stock of goods and some horses in Sioux City. He told him that he could sell the horses for him for one thousand five hundred dollars, and that the goods could be traded for land near Spencer. Engle at the same time stated that Brooks' equity in the farm was not sufficient to cover the goods and horses, and suggested to Brooks that a house and lot in Hartley belonging to Mrs. Brooks be put into the deal. The two went to Hartley, explained the proposed trade to Mrs. Brooks, and she decided to put her Hartley property into the trade with the farm. The next day Engle, with an attorney, visited Brooks and his wife at Hartley, and procured from them deeds of the farm and the Hartley property, with the names of the grantees omitted. He also at the same

time procured the following power of attorney: "This is to certify that we have this 8th day of February, 1898, executed and delivered to J. H. Engle, of Spencer, Iowa, three deeds of conveyance, covering the following described real estate, to-wit: The Southwest $\frac{1}{4}$ of Sec. 8, Township 99, Range 38; the Northwest $\frac{1}{4}$ of Section 8, Township 99, Range 38, and lots 5 and 6, block 4, in town of Hartley, Iowa, and in each and all of said deeds the name of the grantee is left blank. Further, that the said J. H. Engle is hereby authorized and empowered to enter into contracts of sale of each and all of the said tracts of real estate for us and in our stead, and he is especially authorized and empowered to insert in each and all of said deeds the name of the purchaser or purchasers, and thereby transfer to such purchasers full and complete title to said real estate, and to each and every tract thereof. Henry F. L. Brooks. Margaret Brooks. [Seal]" Within two or three days after this transaction, Engle went to Sioux City with a handy man by the name of Chase, and bought four hundred and eighty acres of Cheyenne county, Neb., land, and paid therefor one dollar per acre, and had it deeded to Chase. Engle inserted Chase's name as grantee in the deeds he had received of Brooks and wife. Chase then executed a note for one thousand dollars payable to Brooks, secured by mortgage on the Dickinson county land, and deeded the land and town property to Mary J. Lynch, the mother-in-law of Engle, and delivered the deed to Engle. Chase also deeded the Nebraska land to Brooks. Mary J. Lynch never accepted the deeds to the Brooks property, nor did she have or claim any interest therein, and executed conveyances thereof to Engle upon his request. The deed of the Nebraska land from Chase to Brooks was properly recorded in Nebraska, but never manually delivered to Brooks, nor was it recorded by his direction. On the eleventh day of May, 1898, Engle sold and conveyed the Dickinson county farm to one George Schee, and received for the equity therein

two thousand six hundred and five dollars. In September of the same year Brooks demanded of Engle all money he had received for his Dickinson county property, which demand was refused. The money so received is the money the defendant is charged with embezzling.

Corey & Bemis, Buck & Kirkpatrick, R. M. Wright, and Duffie, Gaines & Kebby for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

SHERWIN, J.—In the preceding statement of the case we have only given the most prominent facts. In addition thereto there are many minor ones. Taken altogether, they stamp the defendant's conduct in this transaction as being as fraudulent and vicious as any recorded in the books, and as deserving of the punishment imposed by the trial court as in any case with which we are acquainted. Notwithstanding the gross fraud perpetrated on Mr. Brooks and his wife by this defendant, we are compelled to reverse this case because of the well-settled legal principles controlling it, which we now consider.

I. Were the deeds to Chase void absolutely, or were they voidable only? If absolutely void and of no effect, of course no title passed to Chase, and he could convey none to others. If voidable only, the title passed to Chase according to the terms of the deeds, and he might, in turn convey to another. At the time the deeds were given to Chase, if, indeed, they were ever actually delivered to him, Engle was authorized to either sell or trade the Brooks land. There is no escape from this conclusion. Brooks so testifies, in substance, and the entire record confirms the defendant's contention on this point. It is true, nothing had been said up to that time about Nebraska land, and the written power of attorney provided for a sale only, but all parties understood, and so talked, that Engle was to either sell or trade

for goods, stock or land, so that Mr. Brooks might eventually realize from his farm, and Mrs. Brooks from her home in Hartley. It clearly appears that every step taken by Engle in these transactions which culminated in his acquiring deeds to the Brooks farm was fraudulent. He bought the Nebraska land himself, and though the title thereto went to Chase, and from Chase to Brooks, it amounted to a transfer of the title from Engle to Brooks and the transactions as to the Dickinson county land were, in effect, deeds from Brooks to Engle. So that, reduced to a final analysis, the entire transaction was in reality an attempted purchase by an agent of his principals' land for a grossly inadequate consideration. It is an elementary principle of the law that an agent employed to sell or exchange property cannot himself become the buyer, without full notice to his principal. It is equally as fundamental, and also well settled by authority, that the principal may ratify such acts of his agent as do not contravene public rights or public policy. In other words, he may ratify acts which are voidable only. Bishop Contracts, section 620; Mechem, Agency, sections 111, 112. While Engle's acts were fraudulent and void if Brooks elected so to treat them, they were not absolutely void, because Brooks might legally have deeded the Dickinson county land to Engle in exchange for the Nebraska land. No question of interest to the public would have been involved in such a transaction between the two. Hence the act of Engle might be lawfully adopted or ratified by Brooks, or it might, at his election, be avoided. Story, Agency, sections 210, 211; Bishop, Contracts, sections 616, 678, 683; Mechem, Agency, section 464; Washburn, Real Property (4th ed.) 456; Story Equity Jurisprudence, section 316; *City of Findlay v. Pertz*, 13 C. C. A. 559 (66 Fed Rep. 427, 29 L. R. A. 188). In *Bassett v. Brown*, 105 Mass. 551, the facts were in many respects similar to those in this case. Brown, while acting as the agent of Bassett for the sale of valuable

land, procured a deed of it to himself, through fraud, and for a consideration which was of little value. The court says: "In either case the deed was voidable only, and not void. The title passed according to the terms of the deed, subject to the grantor's right to reject it. He might elect whether to affirm the conveyance and return the consideration, or to avoid it. If he would do the latter, he must return the consideration, or whatever property he may have received in exchange for that which he conveyed. If, after knowledge, he continued so to deal with the property as his own, it will be treated as an affirmance by acquiescence." See, also, *Boerum v. Schenck*, 41 N. Y. 183. The same principle is recognized in *Buell v. Buckingham*, 16 Iowa, 284. It is contended by the state, however (and numerous authorities are cited in support of its position), that the written power of attorney given to Engle is controlling, and that the power conferred therein was exceeded, and hence the entire transaction was absolutely void. This is fully answered, we think, by the fact heretofore referred to, that the parties themselves did not so intend and even if the agent's authority has been exceeded, as contended, his act was still one that his principal might ratify.

II. Brooks was notified in March of the trade for the Nebraska land, and knew that it had been deeded to him, and the deed properly recorded. He also knew that Chase had executed a mortgage to him on the Dickinson county land securing a note for one thousand dollars, and he borrowed six hundred dollars of the bank, and gave this note and mortgage as collateral security for its payment. In April he notified his former tenant that he was "rid of the Dickinson county land in such a way that he had nothing more to do with it," and that he "must look to Mr. Engle hereafter for leases, and such authority as I wanted on the place." In July he caused two letters to be written to Nebraska, making inquiries as to how the title stood, and as to the value of that land. In answer to these letters he

was informed that the title was in him, and that the land was worth about one dollar and fifty cents per acre. After receiving this information as to the value of the land Brooks and his wife saw Engle, and offered him the land for ten dollars per acre. Before this offer was made to Engle, Brooks had been with Engle to Estherville for the purpose of trading the Nebraska land for land near there. He had also been there for the same purpose with his brother-in-law, Robertson. A little later Brooks refused to execute a mortgage on the Nebraska land for the reason that he wanted to keep that land clear of incumbrance. Other circumstances might be mentioned tending to show that Brooks recognized and treated the Nebraska land as his from March until shortly before criminal proceedings were instituted against Engle in September. It does not appear that the deed to this land was ever manually delivered to Brooks, but this the law does not require. Chase had delivered it to Engle, and it had been recorded. As to Chase, the delivery was complete. *Parker v. Parker*, 56 Iowa, 111; *Adams v. Ryan*, 61 Iowa, 733; *Cecil v. Beaver*, 28 Iowa, 241. By recognizing the land as his, Brooks must be held to have assented to, and accepted this conveyance to himself. 5 Am. & Eng. Enc. Law, 248, 249, and note 5 on page 447; *Robinson v. Gould*, 26 Iowa, 89. The title to this Nebraska land then passed to Brooks, and the title to the Dickinson county land to Engle, subject only to Brooks' right to rescind the transaction upon discovery of the fraud. Until rescission, Engle held an absolute but voidable title, and could convey the same to whom he chose. Brooks never attempted to avoid the conveyance to Chase, nor offered to return the property he had received in exchange therefor. The Nebraska land to which he held title was worth from seven hundred to a thousand dollars. This he dealt with as his own long after he had full knowledge of the fraudulent nature of the transaction, and of the fact that Engle was the real purchaser, and after he knew of the deed

from Engle to Schee. In view of these facts, it is clear that the relation of principal and agent had ceased as to the Dickinson county land when Engle conveyed to Schee, and that Engle was not then bound to account to Brooks for the proceeds of that sale. See cases *supra*, and *Evans v. Montgomery*, 50 Iowa, 337. The charge of embezzlement was therefore not sustained, and a verdict of acquittal should have been directed. The conclusion reached herein makes the consideration of other questions raised by the defendant unnecessary. The case is REVERSED.

D. H. YOUNG, Appellant, v. H. L. RANN.

County Papers: SELECTION: *Appeal to district court.* Where an
 1 appeal from the overruling of a motion to dismiss appeal to dis-
 trict court was not taken within the six months allowed by
 law, it cannot be considered.

111	253
117	157
111	253
135	154
111	253
138	494

APPEAL AND WRIT OF ERROR. Under Code, section 441, providing a
 2 method for the selection of the newspapers to do the county
 printing and allowing an appeal from a decision of the Board
 of Supervisors in making such selection, to the district court,
 such appeal need not be taken by writ of error, but may be by
 appeal as from a justice court.

NOTICE OF APPEAL. A notice of appeal from a decision of a Board
 of Supervisors, to the district court, which recited that it was
 from the action of the board rendered January 27, 1898, in the
 1 matter of the selection of the papers for the county printing,
 was a sufficient designation of the order appealed from.

"BONA FIDE YEARLY SUBSCRIBER" DEFINED. Under Code, section 441,
 providing that the Board of Supervisors shall award the county
 printing to the two newspapers published in the county which
 3 have the largest number of *bona fide* yearly subscribers, within
 the county, it is not necessary that a subscriber should have
 taken the paper for a year in order to be counted, if his sub-
 7 scription was *bona fide* and for a year.

TRIAL: Evidence. Where, on appeal to the district court from a
 decision of the Board of Supervisors awarding the county
 6 printing to the defendant, the defendant introduced no evi-
 dence in the district court as to the number of his subscribers.

a judgment awarding the printing to him was erroneous, since there were no presumptions in his favor, without evidence.

Exceptions on Appeal. Under Code, section 3749, requiring an exception to be taken at the time a decision is made, unless it be on motion or demurrer, where defendant did not take
4 an exception at the time of the decision, but two days later filed his exceptions, and a motion to have them entered with the district court clerk, which motion was submitted to the judge, and sustained, an appeal based on an exception so taken will not be reviewed.

Judge and Court: ACTS IN VACATION. Where defendant addressed a
5 motion to the court and filed it with the clerk, the judge had no power to act on it in vacation.

Appeal from Delaware District Court.—HON. FRANKLIN C. PLATT, Judge.

TUESDAY, MAY 8, 1900.

PLAINTIFF is the publisher of a newspaper known as the *Delaware County News*, and defendant is the publisher of the *Manchester Press*. Bronson & Carr are the publishers of the *Manchester Democrat*. All the above newspapers are published in Delaware county, and each publisher filed with the board of supervisors his certified statement of alleged yearly subscribers. Plaintiff filed exceptions to the statements made by the defendant and by Bronson & Carr, and defendant filed exceptions to the statement made by plaintiff. On the statements and objections thus filed, a hearing was had before the board of supervisors resulting in the selection of the *Manchester Press* and the *Manchester Democrat* in which to publish the proceedings of the board of supervisors. From that decision plaintiff appealed to the district court, where the case was heard, with the same result as before the board. Plaintiff appeals.—*Reversed*.

E. E. Hasner and F. B. Blair for appellant.

E. C. Perkins and Yoran, Arnold & Yoran for appellee.

DEEMER, J.—The material parts of section 441 of the Code are as follows: “The board of supervisors of each county shall select two newspapers published in the county having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: In case of contest the applicants shall each deposit with the county auditor * * * a certified statement subscribed and sworn to, * * * giving the names of the several post offices, and the number and names of the *bona fide* yearly subscribers, receiving their papers through said offices, living within the county, * * * and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers. * * * In case a contest is made by a publisher, the board shall receive other evidence of circulation, and he shall have the right of appeal to the district court, to be taken as in ordinary actions.” A contest arose when the three statements were filed with the board. *Runyon v. Haislet*, 90 Iowa, 376; *Ross v. Campbell*, 98 Iowa, 1. But the parties saw fit to file written exceptions. Plaintiff objected to the list filed by defendant. That list showed one thousand one hundred and four names, but plaintiff claims that it included fifty-six non-residents. He also objected to nine names because these persons were not *bona fide* subscribers. Plaintiff’s list showed one thousand eight hundred and eighteen names. Defendant claims that this list was padded, and fraudulent, in that it contained names of persons to whom the paper was sent without their knowledge, and against their wish; names of persons who had subscribed for a limited time (less than one year); persons to whom the paper was sent for less than the regular subscription price; and persons who were known to be unable to pay,—with the avowed purpose of enlarging the list. He also charged that plaintiff’s list was not in conformity with law, in that it was not verified by the publishers, or by other persons competent to certify thereto;

that the list was so tainted by fabricated testimony that the whole should be rejected, and that the number fraudulently or otherwise added will, when deducted, show that

1 such paper should not be selected. When the case was appealed to the district court, defendant moved to dismiss the appeal because of defects in plaintiff's appeal, and because the matters passed on by the board were final, unless reviewed by writ of error. This motion was overruled, and of this ruling the defendant complains. As he did not appeal from the ruling within the six months allowed by law, his appeal cannot be considered. *Cohol v. Allen*, 37 Iowa, 449. Conceding that we have jurisdiction, there was no error. The notice of appeal recited that it was from the action of the board rendered January 27, 1898, in the matter of selection of the papers for the publication of the official acts of the county the appeal was taken. This was clearly a sufficient designation of the order appealed from. The appeal brought the proceeding into the district court for trial on its merits. *Leftwick v. Thornton*, 18

2 Iowa, 56. A writ of error was not the necessary procedure, even if it be conceded to have been proper. At the trial in the district court defendant conceded that no proof was necessary to sustain plaintiff's exception to defendant's lists, and that for the purposes of the case the names objected to by plaintiff should not be counted. After hearing all the evidence, the court found that there was no fraud in plaintiff's list. It also found, as we under-

3 stand it, that the greater number of names on plaintiff's list were secured during the summer and fall of the year 1897, and that of these the greater number were of subscribers for less than one year; that subscribers recently obtained could not be counted, for their permanency was not sufficiently established; and that it was contrary to public policy to permit the counting of recent subscribers as *bona fide* yearly subscribers. From these findings the plaintiff appeals.

Defendant also served notice of appeal from the finding that plaintiff's list was not fraudulent. Plaintiff has filed a motion to dismiss the defendant's appeal for the reason that he (defendant) had judgment in the court below, and cannot be heard to complain, and for the further reason that no exceptions were taken at the time of the ruling. We have no doubt that defendant might have appealed from so much of the finding as was against him, and, perhaps without appealing, might, in a proper case, urge the correct-

ness of the judgment on the whole record as against
4 plaintiff's appeal. But, to have the benefit of

an appeal, he must show that proper exception was taken to so much of the judgment as was against him. The facts are that the case was submitted to be determined by the judge in vacation. He made his findings and judgment in vacation, on the twenty-eighth day of June, 1898. These findings and judgment were entered of record June 29th. They noted an exception for plaintiff, and gave him time to file a bill of exceptions; but no exception was noted for defendant. On the thirtieth day of June defendant filed with the clerk of the district court what he denominated his "exceptions" and "motion." In this he entered his exceptions to that part of the record finding no fraud, and asked that they be incorporated into the records. He also moved the court to enter of record his exception. This motion was submitted to the judge in vacation, and on July 1, 1898, he made the following indorsement on the motion: "The above motion is hereby sustained, and the clerk will enter the following exception of appellee, viz.: 'Appellee excepts to the finding of the court that the charge of fraud is not sustained, and the conclusions made thereon.' " This entry was thereafter made of record by the clerk. An exception must be entered at the time a decision is made, unless it be on motion or demurrer. Code, section 3749. The ex-

ception in this case was not taken at the time of the decision, and the motion does not cure the defect.

5 That motion was filed after the decision, and is not for a *nunc pro tunc* entry. Again, it was addressed to and filed in court, and the judge in vacation had no power to act thereon without the consent of the parties. *State v. Hathaway*, 100 Iowa, 225. We cannot, therefore, consider defendant's appeal.

II. The record is in such a confused state that it is difficult to tell just what the proceedings were in the trial court. This much seems to be certain, however: that the court held neither certificate as to the number of subscribers filed by the parties with the board of supervisors was competent evidence of the number either newspaper had in the county. Plaintiff introduced independent evidence tending to show that he had a few less than 1,818 subscribers, and some evidence that names found on the list presented to the board by the defendant were not of *bona fide* subscribers. Defendant offered evidence to the effect that many of the names found on the plaintiff's list were not of *bona fide* subscribers, but produced no evidence from which the num-

ber of subscribers to his paper, residing in Delaware county, could be found. The court found there
6 was no fraud on the part of plaintiff, but held that his list was insufficient, because very many of the persons to whom he was sending his paper had not taken it for a year, and therefore they were not *bona fide* subscribers. Acting on the assumption, we suppose, that plaintiff had the burden, and that defendant, having been awarded the printing by the board of supervisors, had, at least, a *prima facie* case, it found defendant entitled to have his paper selected. There are many errors in these rulings. In the first place, the case, as we have seen, was triable on appeal as if it had come from justice court, and no presumption

obtained in defendant's favor. Without evidence as to the number of *bona fide* resident subscribers, defendant
7 was not entitled to have his paper selected. Again, plaintiff was not bound to show that all his subscribers had taken his paper for a year in order to prove the fact that they were yearly subscribers. If they had subscribed for a year, they were yearly subscribers, although they had not taken the paper for more than a month. Plaintiff made a showing of more than one thousand seven hundred yearly subscribers, and defendant made no showing. Even if the court was right in its conclusion as to what constitutes a yearly subscriber, still it should not have awarded the printing to the defendant without some showing as to the number of subscribers to his paper. Again, if the court was wrong in its findings as to fraud, yet defendant was not entitled to the printing on the showing made. Conceding all that is claimed by defendant for his list, it also appears that plaintiff's list is the larger, and, unless defeated by the issue of fraud, he should be awarded the printing. That issue was found against the defendant, and his appeal from the ruling cannot be considered unless it be for the purpose of sustaining the final conclusion of the district court. Conceding that in a proper case this might be done, we do not feel like adopting the rule here, for the reason that under the evidence presented we have no means of determining the actual number of *bona fide* subscribers on defendant's list. The ruling excluding the list he filed with the board of supervisors is not complained of in argument, or, at least, is not argued as error. In view of the whole record, we think the case should be reversed, and remanded for further proceedings in harmony with this opinion. This conclusion renders a consideration of appellant's motion unnecessary. —REVERSED.

IN RE ESTATE OF J. B. REEVE, SARAH A. REEVE, Executrix,
Appellant.

Delivery of Notes: SUFFICIENCY: Evidence. A banker wrote out a note to his daughter, in her presence, which was found in an
1 envelope at his death, deposited in the separate pocket of a note case in his safe at the bank. Envelope also contained certificates of deposit written by him at the time, and other notes indorsed by him in blank. Decedent had written his daughter's name on the envelope, with a statement that the notes were held as collateral security, and had signed his name. *Held*, that such facts showed that decedent had kept the notes as his daughter's banker, for safe-keeping, and for the purpose of collecting and crediting the proceeds of the other notes
3 found therewith, which act constituted a sufficient delivery of the notes.

REDELIVERY FOR SAFE KEEPING. Where notes given by decedent to his daughter as collateral to a note executed by him to her for
1 a *bona fide* indebtedness were delivered to the daughter, the fact that she returned them to decedent, who was a banker, for safe keeping and collection, did not deprive her of her rights
4 in the notes so pledged as collateral.

Estate: CLAIMS: Evidence. Where one of decedent's former em-
1 ployes testified that decedent had requested her in 1895 to figure the interest on his note to his daughter, and there was then nearly \$2,000 due thereon, and that decedent spoke of having the note renewed, saying that he had borrowed the money, and another employe testified that during the fall of the following year decedent and the daughter figured the interest on the note, and her testimony showed that the note in
2 question, dated October 19, 1896, for \$2,310 and found in decedent's safe, was then executed by him, such evidence showed a *bona fide* indebtedness, constituting a valid claim against decedent's estate.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, MAY 8, 1900.

J. B. REEVE died testate June 18, 1897, and appellant, Sarah A. Reeve, his widow, was appointed temporary

administratrix, and, upon the probating of the will, was confirmed as executrix thereof. In her final report she reported a long list of promissory notes as held by certain creditors of the estate, including Mrs. E. M. Pierce, as collateral security. In her report as temporary administratrix she credited herself as follows: "September 4, 1897, by paid to Ella M. Pierce amount of collections on notes Nos. 17,404. 16,691, 17,406, and 17,399, against Charles Grimm, A. J. Boström, Conrad Fuhs, and E. A. Grimm, \$678.85. The said notes, with others, were held by said Ella M. Pierce as collateral security for the payment of the note given by J. B. Reeve, of date Oct. 19, 1896, in amount of \$2,310, bearing 8 per cent. interest after maturity; note payable in one year after its date, and is the property of said Ella M. Pierce." She also credited herself as follows: "Nov. 23, 1897, by check (Pierce collateral notes), \$100.00, which \$100.00 was collected by Ella M. Pierce herself, on collateral notes held by her as collateral for payment of note given by J. B. Reeve, of date October 19, 1897, in amount of \$2,310.00, drawing interest at 8 per cent. after maturity; note payable in one year after its date, and is the property of Ella M. Pierce." J. B. Wolf, for himself and other creditors of the estate, alleging that the estate is insolvent, filed objections to said report, in substance as follows, and in which the administrator *de bonis non* joins: That said note from J. B. Reeve to Ella M. Pierce was wholly voluntary and without consideration, and is void as to creditors; that said note was never delivered by J. B. Reeve to said Ella M. Pierce; that said alleged collateral notes were never delivered by J. B. Reeve to Ella M. Pierce, but remained in his possession and control up to the time of his death; that Ella M. Pierce has not retained possession of said collateral notes, but that they, with her knowledge and consent, have been in possession and control of J. B. Reeve and of the appellant, as administratrix and executrix, and have been treated as the property

of the estate, and that Ella M. Pierce has waived any right she may have had to said collateral notes; that said six hundred and seventy-eight dollars and eighty-five cents and said one hundred dollars were wrongfully turned over to, and paid by appellant to, Ella M. Pierce. The case was tried as in equity, and the claim of Ella M. Pierce on the promissory note of J. B. Reeve to her was allowed as a third class claim against the estate, in the sum of two thousand three hundred and ten dollars, with interest at 8 per cent. from maturity, and said credits for six hundred and seventy-eight dollars and eighty-five cents and for one hundred dollars were disallowed, and appellant ordered to pay over said money to John S. Stanley, administrator *de bonis non*, and to regain possession of said collateral notes within thirty days, and turn the same over to said administrator *de bonis non*. From this decree S. A. Reeve appeals.—*Reversed*.

Lewis Heins for appellants.

Gilchrist & Whipple and *Cato Sells* for appellee.

GIVEN, J.—I. The facts, as we find them to be from the evidence, the competency of which is not questioned, are as follows: For a number of years prior to his death Mr.

J. B. Reeve was conducting a private bank at Garrison, Iowa. At the time of his death Mrs. Ella M.

1 Pierce, daughter of deceased, and her husband, Mr. T. A. Pierce, came from their home, in Colorado, to Garrison. A day or two after the funeral, Mrs. Reeve, Mr. and Mrs. Pierce, and Miss Magirr, who had been employed in the bank up to the death of Mr. Reeve, went to the bank to look over its affairs. In the safe, to which Miss Magirr

had the combination, was an envelope containing said of J. B. Reeve to Mrs. Pierce, said alleged collateral and a certificate of deposit to Mrs. Pierce, and one minor son. Upon the outside of the envelope was a in the handwriting of J. B. Reeve, on one side:

"Ella M. Pierce. These notes are held by Ella M. Pierce as collateral. J. B. Reeve." On the other, the words: "Ella Pierce. Ella Pierce." The alleged collateral notes payable to order, and some of those payable to bearer were indorsed in blank by J. B. Reeve. This envelope and contents were then, and had previously been, kept in the note case used by the bank, but in a separate pocket from the notes of the bank. Mrs. Pierce took and retained possession of said envelope and contents, and produced the note of her father to her on this trial. The note bears credits at different dates from July 21 to October 12, 1897, for amounts collected by Mrs. Pierce on the collateral notes aggregating nine hundred fifteen dollars and seventy-five cents, leaving one thousand three hundred and seventy-one dollars and eighty cents, which she asks to be allowed as a claim of the third class against the estate.

II. On the claim that the principal note was voluntary and without consideration, we will say that we are in no doubt from the evidence, the competency of which is not disputed, that said note represents a *bona fide* indebtedness to the full amount thereof for money loaned and interest thereon. This principal note was unquestionably
2 executed by J. B. Reeve. Miss Clark, who was in his employ in 1895, testifies that on August or September of that year he told her to figure up the interest on his note to Mrs. Pierce "before she came home; that he wanted her to do the same, and compare our figures;" that she did so; and that the note amounted to nearly two thousand dollars. She further says: "I heard Mr. Reeve speak about borrowing money from Mrs. Pierce. He said he thought he would have the note renewed. I heard him say that he borrowed the money during the financial crisis of 1893." Miss Magirr, who was employed in the bank in 1896, testifies: "I remember in the fall of 1896, when Mr. Reeve and Mrs. Ella M. Pierce were at the bank. It was in the evening, after we had closed the bank. They were

at a desk, figuring up her note, and I was at another table. As near as I can remember, I was putting away the checks in the check case. I remember him going to the certificate register and writing out certificates of deposit,—one for \$140, and one for Allan for a smaller sum; \$20, I think it was.” Other testimony of this witness leaves no doubt but that at that time the principal note in question was executed.

III. To sustain her report, the appellant, Mrs. Reeve, testified in her own behalf, and she called and examined Mr. and Mrs. Pierce. The testimony of appellant and of Mr. and Mrs. Pierce is, in part, to personal communications and transactions between them, respectively, and Mr. Reeve, deceased; and to this the appellees object as incompetent, under section 4604 of the Code. In view of our conclusion on the evidence, the competency of which is not questioned, it is unnecessary that we pass upon this objection.

3 We now inquire whether there was such a delivery of the principal note and of the collaterals to Mrs. Pierce as to give her title thereto. That it was the intention of both parties that the principal note should stand as a valid note in her favor, and that the collateral notes should stand as security for the payment thereof, is entirely clear; but, if there was no delivery of the principal note, then it is a nullity, and in that case she would take no title in the collaterals. In 1 Daniel, Negotiable Instrument (3d ed.) section 63, it is said: “It is to be observed, however, that delivery may be constructive as well as actual, by manual passing of the instrument. Where the plaintiff’s bankers indorsed a note to him, and put it in an envelope with his papers, at the same time making appropriate entries of the transaction on their books, it was held sufficient delivery to him, and that a subsequent assignment of the bankers could not defeat it.” It is further said: “But, if advances had been made on the faith of a delivery, then the promisee or indorsee would be entitled to a delivery.” See *Williams v.*

Galt, 95 Ill. 172; *Clark v. Boyd*, 2 Ohio, 56; *Clark v. Sigourney*, 17 Conn. 511. In Tiedeman Commercial Paper, section 34, it is said: "And even where, in indorsing a note the indorser, who sustains the character of banker to the indorsee, instead of making an actual delivery to him, puts it into an envelope containing other papers of the indorsee, this is held to be a good constructive delivery." Mr. Daniel, in his first volume (section 67), says: "It is essential to delivery that the minds of both parties should assent, in order to bind them; and if, through inattention, infirmity, or otherwise, one does not assent, the act of the other is nugatory." As already stated, we are in no doubt but that the minds of both these parties assented that these notes should stand as the property and security of Mrs. Pierce. We give no force to the presumption that would arise from Mrs. Pierce's possession of the notes, that possession being fully explained. We think it fairly appears that, to evidence and secure this existing indebtedness, Mr. Pierce executed the principal note in the presence of, and with the consent of, Mrs. Pierce, and that the same was kept by him thereafter for her as her banker,—for safe-keeping, and for the collection of the collaterals, and the crediting of the proceeds thereof upon the principal note. This we think would constitute a constructive delivery, under the authorities quoted above. See, also, *Sharmer v. Johnson*, 43 Neb. 509 (61 N. W. Rep. 728),—a case in many respects quite similar to this. If it should be said that there was not a constructive delivery, still we think the evidence warrants the conclusion that there was an actual delivery of all the notes. Miss Magirr's testimony alone is sufficient, we think to show an actual delivery. It appears that this principal note was executed in renewal of a former note, with which the callaterals had been put in the envelope.

IV. The claim that these notes, if ever delivered to Mrs. Pierce, were returned to Mr. Reeve, and that thereby

she waived any right she had in them, is not well sustained.

4 If actually delivered, as we think they were, they were returned by her for the purpose of safe-keeping and collection, and that would not deprive Mrs. Pierce of her rights in the notes. In Colebrook Collateral, Security, (2d ed.) section 2, it is said: "The holder of negotiable instruments as collateral security, receiving the same so as to become a party thereto, does not lose his right and title thereto, nor to the proceeds thereof, by a delivery of the same to the pledgor, where such delivery is made with the intention or upon an agreement that the pledgor shall proceed, for and on behalf of the pledgees, to make collection thereof, or do some other proper and necessary act in respect thereto. Where collection of collaterals is the object, the pledgor is regarded as the representative or agent of the pledgee." The author also states that, where there is such a delivery under an agreement that the pledgor may exchange or substitute other collaterals, the exchange does not affect the title to the securities in the pledgee by proper indorsement. It is fairly inferable from all the evidence that it was so agreed in this case, but if not, Mr. Reeve could not affect the rights of Mrs. Pierce by changing collaterals without her consent.

Our conclusions upon the whole record are that this principal note stands for a *bona fide* indebtedness, that the notes claimed as collaterals thereto were set apart and pledged as such by Mr. Reeve, that there was such a delivery of these notes as to vest Mrs. Pierce with title thereto, and that there was no re-delivery thereof that divested her of that title. It follows from these conclusions that the order and decree of the district court must be reversed, and that a decree must be rendered in harmony with this opinion.—*Reversed.*

STATE OF IOWA V. OWEN WORTHEN, Appellant.

Burglary: PRESUMPTION AS TO ATTEMPT TO STEAL. The presumption is that a person who breaks and enters the house of another in
1 the nighttime, did so with intent to steal therefrom, and evidence that one who is shown to have so entered a house was discovered in a room occupied by a female, with his hand on her person, and that, on her making an outcry, he escaped without taking anything is not so inconsistent with a verdict finding that he entered with an attempt to steal as to authorize setting it aside.

OF INTENT. In a prosecution for breaking and entering a house with intent to steal, where the defense denies the attempt to steal, and introduces evidence tending to show that defendant entered for the purpose of having unlawful sexual intercourse with a female, in whose room he was discovered, evidence that
2 the owner of the house had valuable property therein, and that defendant knew about it, is admissible as bearing on the question of intent.

EVIDENCE: Conclusion. In a prosecution for unlawfully breaking
2 into a house with intent to steal, a question to the owner of the house as to whether he had any valuable property that he knew the defendant knew of, calls for a conclusion and is incompetent.

JURY QUESTION. Defendant broke and entered a house in the nighttime, and was discovered in a room in which a female was sleeping. He awoke the girl by placing his hand on her person, and when she attempted to make an outcry he placed his hands
4 over her mouth. Another girl was sleeping with the girl on whose person he placed his hands, and her parents were sleeping in the adjoining room. He had thrown the doors of the house open and lighted a lamp. On the girls making an outcry he escaped without taking anything with him. *Held*, not to raise a presumption that defendant broke and entered the house with intent to commit an assault on the girl, but whether he entered for that purpose or to steal, was a matter for the determination of the jury.

IMPEACHMENT: Minutes before magistrate. Minutes of the testimony taken at a preliminary examination of one charged with
5 a burglary, are inadmissible for the purpose of impeachment, where the witness testified to the same facts on trial that she did on preliminary examination.

INSTRUCTIONS. In a prosecution for breaking and entering a house in the nighttime with intent to steal, an instruction that the jury should consider that the owner was possessed of but very
3 little valuable property, if they find that such was the fact, and the defendant's knowledge thereof, if he had such knowledge, as bearing on the question of the intent with which he broke and entered the house, was properly refused, when there was no evidence that defendant had any knowledge of what property the owner had.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, MAY 8, 1900.

THE defendant appeals from a judgment convicting him of breaking and entering a dwelling house with intent to commit larceny.—*Affirmed.*

C. Nichols for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

LADD, J.—A man's hand on the person of Grace Fort awakened her at one o'clock in the nighttime of June 6, 1898. She was prevented from screaming by the other hand covering her mouth, and was told to keep still.
1 As soon as she was able to call for help, the intruder left the house through the doors, which were open. Her father reached the adjoining room as he left, and, though giving chase, was unable to overtake him. By the lamp light and that of the moon, however, he recognized the defendant. Evidently, he had entered through the window of the bedroom where Grace, who was sixteen years old, and a sister were sleeping. The upper sash had been lowered a few inches, and was held in position by a piece of lath previously nailed on the outside. This was removed, the sash let down, and footprints, corresponding to defendant's shoes, appeared leading to the window from across the road, where a horse and buggy had been standing.

The defendant insists that, though the motive in entering Fort's house cannot be justified, the intent to steal is not to be inferred from these facts. Some presumptions are to be indulged in against one who enters a building unbidden, at a late hour of night, else the burglar caught without booty might escape the penalties of the law. "The love of gain, the desire to get and have, is so wide a principle of human nature, that, other motives being eliminated, that remains as a sort of residuary solvent of conduct." *Steadman v. State*, 81 Ga. 736 (8 S. E. Rep. 420). People are not accustomed, in the nighttime, to enter the homes of others, when asleep, with innocent purposes. The usual object is theft, and this is the inference ordinarily to be drawn, in the absence of explanation, from breaking and entering at night, accompanied by flight upon discovery, even though nothing has been taken. *State v. Teeter*, 69 Iowa, 718; *State v. Maxwell*, 42 Iowa, 211; *State v. McBride*, 97 N. C. 393 (1 S. E. Rep. 925); *Alexander v. State*, 31 Tex. Cr. App. 359 (20 S. W. Rep. 756).

Do the facts of this case render such an inference improper? In *Harvey v. State*, 53 Ark. 425 (14 S. W. Rep. 645), a woman was awakened in the nighttime by the hard breathing of a stranger near her face and touching a private part of her person. She screamed, and saw him getting out of the window. The circumstances of *State v. Boon*, 57 Am. Dec. 555, were similar, except that the accused there touched the foot of the sleeping girl, and after it was drawn up grasped the ankle. In each of these cases a conviction of entering with intent to commit rape was sustained. The situation of the defendant when found kneeling at the bedside of the sleeping girl with his hand on her private parts, certainly indicated that he then had designs on her person, but other circumstances point to the improbability of that being his purpose in entering. The natural impulse of one intending to satisfy his lust would have been to prevent intrusion and insure secrecy. The record is silent as to the

time he had been in the house, but shows that the doors were thrown open, and a light was burning in the front room. There were two girls in the bed. Fort and his wife were sleeping in an adjoining room. It is all but inconceivable that defendant, preparatory to assaulting this girl, opened up the house, or contemplated doing so with it open. A conclusion quite as reasonable is that, disappointed in his search for valuables he turned his attention to other things. The case is more like *Coleman v. State*, 26 Tex. App. 252 (9 S. W. Rep. 609), where a sleeping girl was awakened by the hand of the intruder on her breast. Five other persons were sleeping in the house. Nothing indicated he was not there by her consent, save her outcry and order to leave. The court declared "it more reasonable from the evidence to conclude that his intent was to commit theft than to commit any other crime." See, also, *Mitchell v. State*, 33 Tex. Cr. R. 575 (28 S. W. Rep. 475); *Hamilton v. State*, 11 Tex. App. 116; *Robinson v. State*, 51 Md. 153. In *People v. Soto*, 53 Cal. 415, the accused entered a bedroom (where a woman and three children were sleeping) through a window, seized the woman by the throat, and threw himself across the bed, but, on her making an outcry, escaped without taking anything. Notwithstanding her opinion that his intention was to carnally know her, a conviction of entering with intent to steal was sustained, the court saying: "The intent with which he entered was a question of fact for the jury, and, though there was no direct evidence of the intent, it might be inferred from the surrounding circumstances. The weight to be given to this was a question properly left to the jury, and when a person enters a building through a window at a late hour of the night, after the lights are extinguished, and no explanation is given of his intent, it may well be inferred that his purpose was to commit larceny, such being the usual intent, under these circumstances. The belief of the woman that he entered with the further intent to be criminally intimate with her is of no consequence. It was

for the jury to determine the intent, and whether her belief was entitled to any weight." While the conduct of the defendant at the bedside was to be considered in fixing upon his purpose in putting down the window and climbing in, we do not regard it as conclusive. In view of all the circumstances of the transaction, including the presumption to which we have referred, the jury may have deemed it an afterthought, and concluded that the intent to commit larceny was the original motive, or that he entered with both purposes. Such a finding was not inconsistent with the facts established, and the verdict ought not to be disturbed.

II. Fort was asked this question: "Now, did you have any valuable property that you knew that the defendant knew of?" This so evidently calls for a conclusion

that no argument is required to uphold the court's
2 ruling excluding the answer as incompetent. In

one view, it made no difference whether the defendant knew anything of value was in the house or not; for the intent to steal, and not its execution, is the essential ingredient of the crime charged. *Lanier v. State*, 76 Ga. 304; *State v. Beal*, 37 Ohio, St. 108; *Harvick v. State*, 49 Ark. 514 (6 S. W. Rep. 19). But evidence of this character was admissible as bearing on the intent of defendant in entering,—whether to steal or assault the girl. It appeared from Fort's testimony, drawn out after the above ruling, that the valuables in the house were a suit of clothes nearly new, six
3 or eight dollars in money, and a watch. There was
no evidence of defendant's knowledge of what Fort had and for this reason the ninth instruction, relating thereto, was rightly refused.

III. The defendant requested the court to instruct that if he, "after such entry, went to the bed where Grace Fort was sleeping, and placed his hands upon her, and when Grace Fort awakened defendant placed his hand over the mouth of said Grace Fort and told her to keep still, and when said Grace Fort called to the others the defendant

made his escape, then a strong presumption would
 4 arise that he did so break and enter for the purpose
 of committing some crime against the person of said
 Grace Fort;" and if the jury so found, and failed to find
 that he also had the intention at that time to steal, he should
 be acquitted. Had the facts been as suggested by the in-
 struction, without more, it may be such a presumption would
 arise; but no mention is made of the defendant opening the
 doors prior to going to the bedside, or of the presence of the
 other girl in the same room, or of the parents in that near
 by. With the conditions as shown by the evidence, we think
 no presumption can be indulged with reference to his de-
 signs on Grace Fort. Whether he entered to assault her
 or to steal was a matter to be inferred from all the circum-
 stances, and the court so instructed the jury. The case is
 unlike *State v. Mecum*, 95 Iowa, 436, as there the explana-
 tion indicated the intent in entering, and the defendant's
 situation, when found, was such as to warrant the
 5 presumption he was carrying it out. The minutes
 of testimony attached to the indictment did not tend
 to impeach the witness, as she made the same statements at
 the trial, and for this reason were properly excluded.—
 AFFIRMED.

IOWA BRICK COMPANY, Appellant, v. CITY OF DES MOINES
et al.

111	272
121	687

City Contracts: MECHANIC'S LIEN: Defense. Where an agreement
 between a city contractor and a material man, filed with the
 board of public works, provided that 30 per cent. of the cer-
 1 tificates issued for the work done by the contractor be assigned
 to the material man as collateral for payment of material, and
 when the material used in each section into which the work
 was divided was paid for, the certificates issued and assigned for
 2 such section should be surrendered, it was no defense, to an
 action by the material man against the city to establish a
 mechanic's lien for material used in constructing subsequent

sections, that plaintiff had been assigned sufficient certificates to pay his entire claim, and had surrendered the same, such certificates having been assigned to secure material used in previous sections which had been paid for.

BURDEN OF PROOF: *As to payments made by it.* Where the city's defense to an action for mechanic's liens for materials furnished a contractor was that it had paid out all the contract price on other claims, the burden of proving that such claims were legally filed was on the city, because such fact rested peculiarly within its own knowledge.

Appeal: ARGUMENT: *Review.* On appeal, matters not discussed in argument will not be reviewed.

Appeal from Polk District Court.—HON. CHARLES A. BISHOP, Judge.

WEDNESDAY, MAY 9, 1900.

ACTION in equity to establish and enforce a mechanic's lien. From the decree rendered, plaintiff appeals.—*Modified.*

Baily, Ballreich & Preston for appellant.

J. Edward Mershon and *W. C. Strock* for appellees.

WATERMAN, J.—The issues presented arise wholly out of the respective claims of plaintiff and the city of Des Moines. The firm of Kavanaugh & O'Connell, also defendants herein, had a contract for constructing a sewer for said city, at a total cost, including extras, of fifty thousand one hundred and ten dollars and seventy-two cents. They purchased the brick for such work from plaintiff under a written contract, by the terms of which as originally made, Kavanaugh & O'Connell, second parties, sold and assigned to plaintiff a certain part of the price, to be paid as follows: "In order to secure the payment of the sums to become due for brick furnished under this contract, the said second party agrees to sell and assign, and by these presents does hereby sell and assign, to the first

party thirty per cent. of all sewer certificates to be issued to said second parties by the city of Des Moines against abutting property in payment for said sewer, as collateral security for payment for said brick. And it is agreed that this contract, when filed with the city clerk, shall be an order on him to deliver said certificates to said first party, and no further authority shall be necessary. It is also stipulated and agreed that said second party hereby sells and assigns to said first party thirty per cent. of any sums due or to become due said second party which are payable from the sewer fund under this contract, in warrants on the sewer fund of the said city. The said second parties hereby agree and stipulate that at the end of each month they will, if possible, procure from the city engineer and board of public works a certificate or estimate, approved by the council, showing the amount due for the work on said sewer which is payable in warrants on the sewer fund; and thirty per cent. of all the said estimates of said certificates, excepting three thousand dollars' worth, which, by the contract with the city of Des Moines, are to be paid in 1894, are by these presents hereby assigned to said first party as collateral security under the contract, and when a copy of this contract is filed with the board of public works it shall be authority for them to deliver said estimates or certificates at once to the first party. The parties of the first part are released from strict performance as to delivering brick in case of strikes, impassable roads, and unavoidable accidents. And it is hereby mutually agreed that should the Iowa Brick Company during any month receive of the second party cash for all brick laid in the sewer by count or by estimate during the previous month, with interest as herein agreed, the Iowa Brick Company shall surrender to the said Kavanaugh & O'Connell all certificates, warrants, and estimates which it may have received as collateral security for said brick; but, in case said certificates, warrants, and estimates shall not be thus redeemed

by cash during the month as aforesaid, then it is hereby agreed that the said Iowa Brick Company may sell said certificates, estimates, or warrants at private sale at the highest price which they may be able to obtain, with reasonable efforts, to satisfy their claim and interest for the brick covered by said collaterals." Some time after this an additional ten per cent. was added to the amount so assigned. In the written contract between Kavanaugh & O'Connell and the city for the construction of the sewer, there was a provision that the city should reserve fifteen per cent. of amounts due until the completion of the work. Plaintiff filed two statements, under chapter 179, Acts Twentieth General Assembly, for a lien on the balance due on the contract. The first of these was filed May 21, 1896, and the other on December 4th of the same year, which was two days after the last lot of brick was furnished by it to the contractors. The decree of the district court, which as to the facts we shall now mention is not questioned, determines that the balance due plaintiff for brick furnished is one thousand thirty-one dollars and eighty-four cents; that on March 1, 1897, the city had in its possession, due and unpaid on said work, the sum of one thousand sixty-three dollars and seventy-seven cents; that out of this amount it paid one L. E. Bolton, on March 31, 1897, the sum of six hundred and twenty-three dollars and seventy cents, and on June 7th following to certain laborers the sum of one hundred and thirty dollars and fifty-five cents, leaving a balance of three hundred and nine dollars and fifty-two cents; for which amount, with interest thereon at six per cent. from the twelfth day of January, 1897, judgment was rendered in plaintiff's favor against the city.

II. The contention of the city is, first, that plaintiff had warrants or certificates in a sufficient amount assigned to it under its contract with Kavanaugh & O'Connell to pay its claim in full, and that it surrendered the same to the contractors. The contract provided that the assignment of these certificates should be for collat-

eral security only; that when the brick used in the section for which the certificates were issued were paid for the certificates should be surrendered. The brick company had no right to hold the same as security for future deliveries. The surrender made was strictly in accord with the terms of the contract, and that instrument or a copy was on file with the board of public works of defendant city, so the latter had or should have had full knowledge of its provisions. We cannot see why plaintiff should lose any rights because of its compliance with the contract.

III. It is next contended by the city, on the authority of *Epeneter v. Montgomery County*, 98 Iowa, 159, that it was not obliged to retain the fifteen per cent. reserve for the benefit of subcontractors, but that it might at any time waive such provision, the same being for its sole benefit. We hardly think that case goes to the extent claimed for it; but, however that may be, it is conceded here that the city, after it had full notice of plaintiff's claim, had on hand an amount sufficient to pay it, and that this money was paid out in part on other claims.

IV. The petition alleges "that at the time plaintiff's said claim was filed there actually remained in the hands of defendant city, of the contract price and cost of construction of said sewer, more than the amount of plaintiff's said claim; that no other claims for labor or material furnished or used in the construction of said sewer were ever filed in manner and form as by the statute provided, and plaintiff became and was therefore entitled to be first paid out of said funds before any other claims were paid therefrom." The answer is in denial. The trial court found there was no evidence as to when the labor and materials were furnished by Bolton and others, to whom the city paid the total sum of seven hundred and fifty-four dollars and twenty-five cents, after having notice of plaintiff's claim; and it also found there was no evidence to show whether those parties had filed verified claims, as provided by chapter 179, Acts Twentieth

General Assembly. The court further expressly held that the burden "was on plaintiff of proving that said payments were not made on claims entitled to priority over the claim of plaintiff." Whether the claims of Bolton and the laborers were filed with the city authorities, as provided by law, was a fact peculiarly within defendant's knowledge. The rule, as laid down in *Greenleaf Evidence*, section 79, is: "Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." So in *Swafford v. Whipple*, 3 G. Greene, 261-265, this court said: "Hence it is laid down that the *onus probandi* lies upon the party who seeks to support his action or defense by a particular fact of which he is supposed to be cognizant." See, also, *Jones v. Association*, 92 Iowa, 652. We think the rule of law announced by the trial court was erroneous. It was shown that on March 1, 1897, defendants had on hand and due for materials and work for said sewer one thousand sixty-three dollars and sixty-seven cents. Plaintiff's claim was then on file. Presumptively it was entitled to payment in full. As to payments made to others out of this fund, the burden was on defendants to show they were made on claims that were prior in right to that of plaintiff. Having failed in this, plaintiff is entitled to the whole fund on hand March 1, 1897, or so much as will satisfy its claim.

Plaintiff asserts that it is entitled to seven per cent. interest, which was the rate fixed in its contract with Kavanaugh & O'Connell from April 1, 1897. The trial court allowed six per cent. interest from January 12, 1897. As this matter is not discussed in argument, we shall permit the finding of the district court as to the rate of interest to stand. Modified as stated, the judgment will be AFFIRMED.

111	278
135	21

J. M. DORR, Appellant, v. LORE ALFORD.

Contracts: ASSIGNABILITY. Where a corporation owning land subject to a mortgage entered into certain contracts with defendant, and agreed to hold the land in trust, and to sell, collect, and pay over to defendant a certain proportion of the proceeds arising from the sale thereof, less the amount of the mortgage, on his agreement to pay \$1,000 on each contract taken out by him, and a pro rata share of survey and grading expenses, such contracts were assignable; and a pledge thereof by the corporation as collateral to the mortgage, or its failure to pay the same, under an agreement that it would collect and pay the balance due on such contracts to the mortgagee, to be applied on the mortgage, constitutes a valid assignment thereof.

CONSTRUCTION. Where a corporation owning land subject to a mortgage agreed with defendant to hold it in trust, and to sell, collect, and to pay over to him a certain proportion of the proceeds, on his agreement to pay \$1,000 in installments, defendant was not entitled to demand a conveyance of any portion of the lands, but only to share in the proceeds arising from the sale thereof.

SPECIFIC PERFORMANCE. Where a corporation owning land agreed to hold the same in trust, to sell, collect, and to pay over to the defendant a certain proportion of the proceeds, less the amount of a mortgage due thereon, on his agreement to pay \$1,000 in installments, etc., and on the non-payment of the mortgage, arising from the contract holder's failure to pay installments, the corporation assigns such contracts to the mortgagee, to apply the balance due thereon in payment of the mortgage, the fact that its payment would exhaust the lands and render the corporation insolvent, so that neither the mortgagee nor the corporation would be able to perform the contract, constitutes no bar to the mortgagee's recovery on the contract; such inability having arisen through no fault of the mortgagee or the corporation.

FRAUD: Waiver. Where defendant, after becoming fully informed of false and fraudulent representations inducing his contract, received benefits thereunder, and made no claim of fraud before the commencement of an action thereon by the assignee of the corporation with which the contract had been made and of which he had become a director, he was not entitled to allege such fraud as a defense to the action.

Pleading: PRAYER: Construction of. A prayer in plaintiff's bill to enforce payment of a balance due on a land contract, asking
5 a decree requiring defendant to pay the amount due by a certain day, and, in default thereof, that plaintiff have judgment, is demanded for a money judgment, enforceable by execution, and not for a decree of specific performance.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

WEDNESDAY, MAY 9, 1900.

THIS action was originally commenced at law to recover a money judgment upon certain contracts. On motion of the defendant the case was transferred to and tried as in equity, over plaintiff's objections, which objections he now waives, and the case is therefore before us for consideration as in equity, on the appeal of the plaintiff from a judgment dismissing his petition.—*Reversed.*

Dudley, Coffin & Byers and Thos. F. Stevenson.

Lore Alford and Bowen & Brockett for appellee.

GIVEN, J.—I. The record before us is quite voluminous and may only be noticed in a general way. The issues and facts are in most respects the same as in *Dorr v. Cory*, 108 Iowa, 725, decided after the holding in this case in the court below. On January 14, 1890, the plaintiff, being the owner thereof, conveyed to J. H. Snooke, as trustee for the West End Syndicate, a co-partnership composed of A. W. C. Weeks, R. G. Scott, and J. N. Neiman, for the consideration of forty-eight thousand forty-four dollars and sixteen cents, a certain thirty-seven blocks, containing eight hundred and thirty-nine lots, in the plat of the West End, an addition to the city of Des Moines. Mr. Snooke, as such trustee, executed to Mr. Dorr eight hundred and thirty-nine promissory notes, aggregating forty-seven thousand seven hundred and thirty-six dollars and eighty-four

cents, being the balance of the purchase price, and a mortgage on said real estate to secure the same. The West End Syndicate entered into a number of contracts with Mr. Cory and others as shown in the case of Cory, which contracts in most respects are the same as those thereafter entered into with this defendant, and upon which this action is brought.

1 On July 2, 1890, said partnership became incorporated under the same name, to-wit, the West End Syndicate, and all the property of the partnership was transferred to it. On March 3, 1891, said corporation and this defendant entered into ten contracts, in writing, by each of which the corporation agreed "to hold in trust, sell, collect, and pay over to the party of the second part the proceeds from the sale of the one-hundred and fiftieth of the following described real estate," describing the real estate conveyed by Mr. Dorr. In consideration of this, the defendant agreed to pay upon each contract one thousand dollars in four equal annual installments, less the amount credited on the contracts, with eight per cent. interest, "and also their pro rata share of any amount due or to become due for surveying, platting, and grading of said subdivision when called for by the board of directors." It is provided in said contracts that the corporation shall have a lien on each share for the unpaid purchase price; that the care, management, and disposition of the property shall be in the board of directors; that the corporation shall hold the land in trust for all parties interested; have power to make contracts, deeds, leases, and mortgages on behalf of its beneficiaries, to take mortgages on sale of lots, and on payment to release or assign such mortgages; "provided, however, that all such deeds, leases, contracts, and conveyances shall first be d by its board of directors." It is further provided that: money hereafter derived from the sale of lands and lots, m material sold from said premises, or from rentals re-, shall, after payment of taxes, interest, incumbrances, xpenses, be ratably divided among the parties in inter-

est. It is also understood and agreed that there is an incumbrance of forty-seven thousand seven hundred and thirty-six dollars and eighty-four cents upon said land; to be payable on or before six years from Jan. 14, 1890, and which is distributed upon the lots and subdivision, and payable out of the proceeds of sales and rents." The contracts with Mr. Cory and others, being with the co-partnership, were worded accordingly; but the difference in the language is not such as to render their effect different from that of the contracts with the defendant. In the Cory contracts, money derived from sale of lots, material, or rents was first to be applied to the payment of taxes, interest, incumbrances, and expenses," while in this it is to "taxes and expenses." In those contracts, after the word "subdivision" in the paragraph last quoted, are the words, "and payable out of the proceeds of sales like this." We may say here that we do not think the differences in the language between these and the Cory contracts are such as to vary their meaning or effect. The corporation having failed to pay the principal and interest due to Mr. Dorr on the mortgage debt, a further contract, in writing, was entered into by Mr. Dorr, of the first part, and the corporation, of the second part, in substance, as follows: The corporation placed in the hands of Mr. Dorr, as collateral security to said mortgage indebtedness, said contracts with the defendant Alford and a number of like contracts with other persons, "with all the balance due second party on said contracts, amounting to
2 about \$33,000." Said contracts contain the following: "It is agreed by first party that second party shall have charge of the collection on said collaterals at their own expense, and shall pay them in, on the order of first party, to a Des Moines bank named by first party, which shall receipt for the same, less any tax paid, from said fund on said mortgaged property. Said payments or collections, when made, to apply on the tax assessed against lots in said

West End addition, interest and principal on said above-mentioned mortgage; all funds to be applied at any and all times to the payment and release of any particular lot or lots that second party may elect to have released. When the entire amount of incumbrance on all the lots shall in this way or otherwise have been released, then said mortgage shall be released in full, and said contract surrendered to second party. Said collateral shall at no time be separated from said notes or become security for debts of first party. And, in consideration of said collateral being so placed and turned over to first party, he agrees for himself, his heirs and assigns, not to bring any suit on account of the nonpayment of any interest due on the above-mentioned mortgage of \$47,737 until the date on which said mortgage becomes due, to-wit, January 14, 1896." The defendant, Alford, is entitled to certain credits on said contracts, and the plaintiff, Dorr, as holder of said contracts as collaterals, brings this action thereon to recover the balance due, the corporation having failed and refused to so do. It appears that Mr. Weeks held ten contracts the same as those held by Mr. Cory and others; that an effort was made to induce the defendant to take said contracts of Weeks, which resulted in the making of said ten contracts between the defendant and the corporation. The defendant answered at great length, setting up a number of reasons why the plaintiff should not have the relief demanded, and which will be hereafter noticed,—among them, the defense that said contracts were obtained by fraud.

II. Defendant's first contention is that the contracts sued upon are not assignable, were not assigned to the plaintiff, and therefore he is not the real party in interest, and cannot sue thereon. As to their assignability, they
3 are the same as the Cory contracts, and were assigned to plaintiff as those were. In that case we said, "The record fails to show any valid objection to the transfers of the contracts to the plaintiff, or to a recovery by him

of the amount due thereon in this action. Following this we held that those contracts were not only assignable, but were assigned to the plaintiff.

III. The defendant's counsel, assuming that specific performance on the part of the defendant of the contracts sued upon is the relief asked, and that plaintiff's mortgage will exhaust the real estate, and leave the corporation insolvent, contend that neither the corporation
4 nor the plaintiff is able to perform the contracts on the part of the corporation, and therefore the plaintiff is not entitled to the relief asked. It is the law that the party asking a decree to enforce specific performance by one party to a contract must show that the other party is ready, able, and willing to perform his part; but, as we view it,
5 this is not such a case. It is true that when forced into equity the plaintiff did ask a decree requiring the defendant to pay plaintiff the amount due within a day to be named, and, in default, that plaintiff have judgment. This is nothing more than a demand for a money judgment. There is nothing for the defendant to do in performance but to pay the money. Such performance is not enforced by decree, but by judgment and execution. Counsel for defendant construe the contracts as being for the conveyance of real estate, and therefore insist that the corporation cannot perform. The contracts upon the part of the corporation are not to convey, but "to hold in trust, sell, collect, and pay over to the party of the second part the proceeds from the sale" of the party named. Defendant has no right to a conveyance, but simply to share in the proceeds. The defendant promised to pay his note, conditioned upon his receiving proceeds he promised to pay "in four equal annual installments,—on the first day of January, in the year hereafter;" that is, after March 3, 1891. There is no limit to the time in which the corporation is to hold, sell, collect, and pay over, and we cannot say but that, if defendant's

contracts and other like contracts are promptly paid, the corporation may be able to do these things. If
6 it should be held that the corporation is not and will not be able to perform on its part, it is surely not because of any act of the plaintiff. The failure of the enterprise is clearly traceable to the refusal of the defendant and others with whom the corporation had like contracts to pay, as they had agreed, a refusal for which the defendant is largely responsible, and which was advised and made in part at least, because of a large shrinkage in real-estate values. If these collaterals had been promptly paid, they would have gone far towards satisfying the mortgage debt, of which all parties had knowledge, and would have left the corporation able to sell, collect, and pay over. We do not find that either the corporation or the plaintiff did anything that rendered them unable to perform, and we are inclined to believe that with prompt payment of these contracts the corporation would have gone forward to a successful management of the enterprise. If it should be said that neither the corporation nor the plaintiff is able to perform the contracts, still, in view of the nature of the contracts, the unconditional obligation of the defendant to pay, and of the fact that the inability was brought about, in part at least, by the defendant, not by the plaintiff or the corporation, we conclude that that inability should not defeat the plaintiff's right to the relief asked.

IV. We next inquire as to the fraud alleged by the defendant in the procuring of the contracts sued upon. We will not attempt to set out these charges nor the evidence
7 in detail. There is evidence tending to show that extravagant and false representations were made to the defendant as to the character and value of the land, the price agreed to be paid to Mr. Dorr for it, and of other matters set up in the answer. Question is made as to whether the corporation or the plaintiff is bound by the representations of the parties making them; but, as we view

the case, this need not be determined. While there is no doubt but these representations were made to the defendant to induce him to enter into the contracts in suit, it is claimed that in doing so he did not rely upon the representations, but examined for himself. Before entering into the contracts he examined the land, and made a careful and thorough examination of the books and files of the corporation. If it be true that he did rely upon said representations complained of as fraudulent, it is certainly true that thereafter he had full information as to all the matters charged; and with that information he continued to stand upon his contracts, to receive the benefits thereof, and to act with and for the corporation, not only as a party to the contracts, but as one of its directors. As late as December 1, 1894, the defendant wrote to the plaintiff, saying: "I intend to pay all I owe next year, or by Jan. 1, 1896; but I cannot pay it by Jan. 1, 1895. I paid \$1,000 last spring." It does not appear that this claim of fraud was ever made before the commencement of litigation. In the law action of Cory we reversed the holding that the issue of fraud should have been submitted to the jury. In this equity case the issue is before us for determination, and upon it our conclusion is that defendant had failed to sustain his defense of fraud.

V. It follows from the conclusions announced that the plaintiff is entitled to judgment against the defendant for the amount of the contracts sued upon, namely, ten thousand dollars, with interest at eight per cent., less the following credits, to which we find the defendant entitled:

March 31, 1891, the sum of.....	\$2,000 00
December 31, 1891, the sum of (sales of lots).....	1,524 66
December 31, 1891, the sum (rent).....	44 11
March 26, 1892, credit above interest.....	528 00
December 31, 1892, by sale of lots.....	605 76
December 31, 1892, by rent.....	10 14
April 1, 1893, the sum of.....	529 50
April 1, 1893, the sum of.....	470 50
May 3, 1893, the sum of.....	1,000 00
May 3, 1893	18 90
May 5, 1894, the sum of.....	419 64
May 5, 1894, the sum of.....	580 36

The judgment of the district court is reversed, and the case remanded for judgment in harmony with this opinion, or, at the option of the plaintiff, judgment may be rendered in this court.—REVERSED.

111 286
138 522

STATE OF IOWA V. C. B. KEENAN, Appellant.

Libel: WHAT IS. Complainant was a county superintendent of schools, and defendant published of him that there had not
1 been a meeting of teachers in the county at which complainant had presided, at which the rules of common decency had not been outraged; that defendant was irreligious, an infidel, and an unbeliever; that he was dishonest; that it was known that he opposed the petition of the people who desired Congress to legislate so as to have Almighty God in the constitution; and that it was generally believed the defendant contributed an
9 article that was a disgrace to any decent man. *Held*, that on a trial of the prosecution for libel, the court properly charged the jury that each of the statements was, of itself, libelous, and warranted conviction, unless justified, since the statute defines libel to be the malicious defamation of a person, tending to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence and social intercourse.

SAME. Where defendant published that complainant was vulgar,
9 such statement, of itself, was libelous, if made in the sense that complainant was low, base, and unfit for the society of refined people.

PRIVILEGE. Where on trial of a prosecution for libel, defendant
10 claimed that, as the one of whom the statements were made was a candidate for office, the publication was privileged, the court properly instructed the jury that the publication was not privileged unless made for the sole purpose of advising the electors.

EXAMINATION OF COMPLAINANT: *Rebuttal.* Where defendant had published that complainant was dishonest, and, on prosecution for libel, defendant, as part of his justification, offered
2 evidence to show that he had failed to pay debts contracted while living in another state, it was proper to ask complainant in rebuttal, as to his family, means, and occupation while there.

SAME. Where on trial of a prosecution for libel, after defendant, as part of his justification, had offered to show that complainant

at one time had a woman of bad repute when his wife was
5 absent, it was proper to allow complainant to show how many
children he was taking care of at the time, and their ages, as
showing the circumstances surrounding the complainant at the
time when it was claimed he was consorting with lewd women.

SAME: Reputation. Where defendant, as part of his justification,
6 had offered evidence tending to show that complainant had
associated with lewd women, it was proper to admit testimony
that there was no general talk in the community where com-
plainant lived, that he was of lewd character.

EVIDENCE: Exclusion. It was not error to refuse to permit de-
3 fendant to state the contents of a letter, which he then had in
his possession in the court room, and which was immediately
introduced and marked as an exhibit.

SAME. On trial of a prosecution for libel it was proper to reject
4 the testimony of a minister as to the propriety of an article
not in evidence, but which it was claimed was published from
a printing office in which complainant at one time worked.

Witness: ATTACHMENT: Payment of fees. Code, section 1298, de-
clares witnesses in criminal cases may demand their fees in
advance, unless the subpoenae was issued under order of the
7 judge; and section 4662 that a witness not paid his fees as
required shall not be compelled to attend. *Held*, that where
defendant in a criminal case subpoenaed a witness and the
subpoenae did not show that it was issued under an order of a
judge, and witness demanded his fees, which were not paid and
witness failed to attend, the court properly refused to issue
an attachment compelling attendance.

Argument of Counsel: PRESERVATION FOR APPEAL. Where the taking
8 of opening statement of counsel by the reporter was waived
and the statement not preserved by a bill of exceptions, such
statement cannot be reviewed on appeal.

Appeal from Page District Court.—HON. WALTER I. SMITH,
Judge.

WEDNESDAY, MAY 9, 1900.

THE defendant was convicted of libel. From a judg-
ment imposing a fine, he appeals.—*Affirmed.*

Wm. Orr and Geo. I. Miller for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

SHERWIN, J.—The indictment was based upon the publication of the following written article, which the defendant admits he wrote, and which he admits was published as charged: “There has not been a meeting of the
1 teachers in this county at which this man has presided that the rules of common decency have not been outraged. As a specimen of his education, incident to his schooling, when connected with the Sentinel, ye gods, hear his expressions, ‘High cockolorum,’ ‘monkeying,’ etc., etc. Every teacher knows that these are specimens of his expressions in the presence of delicate and polite ladies, and he assuming to be a teacher and an educator. Every one has had to blush for him; to call him down, and correct him; as every man and woman of this county that has been so unfortunate as to come in contact with him well knows. Professor Bell and other teachers have corrected his expressions, and I say, without fear of successful contradiction, that he is not sufficiently refined for the position that he has incumbered. He is irreligious; he is vulgar; he is incompetent; he is dishonest; he is a politician of the dirtiest sort, and entirely unfit to hold the position to which he aspires. He is well known by the people of this county, and particularly of the town of Shenandoah, and he opposed the petition of the good-intentioned people of this county who desired congress to legislate so as to have Almighty God recognized in the constitution. It is currently reported, and generally believed, that he contributed an article that is a disgrace to any decent man. He is an unbeliever and an infidel; therefore, unfit for the place.” In addition to his plea of not guilty, the defendant filed a plea in justification. We will first notice the errors complained of in the reception and rejection of testimony.

As a part of his justification that Mr. Deater was dishonest, the defendant offered evidence tending to show that he had failed to pay debts contracted while living in Illinois. In rebuttal the state asked Deater several
2 questions as to his family, means, and occupation while there, answers to which were admitted over the defendant's objections. These questions were all competent as bearing upon the question of his ability to pay his debts, and as tending to rebut the claim of dishonesty in not doing so. There was evidence that the defendant had sued Deater on a claim he held for collection, and Deater was permitted to testify that he had never been sued except that time. This was admissible also upon the question of his honesty.

Complaint is made of the refusal of the court to permit the defendant to state the contents of a letter
3 which he then had in his possession in the court room, and which was immediately produced, and marked as an exhibit. This was not error.

The defendant was asked for conversations with Deater as to his promise of reformation. He gave a part of his answer, and was interrupted by the objection that it was not responsive. He seems to have gone on, and finished his answer, no part of which was stricken out. No error appears in sustaining this objection.

It is next contended that the court erred in rejecting the testimony of a minister as to the propriety of an article
4 not in evidence, but which, it was claimed, was published from a printing office in which Deater at the time worked. The article not being in evidence, the objection that the offered testimony was not material was clearly well taken.

After the defendant had offered evidence to show that Deater at one time had a woman of bad repute in his house

when his wife was absent, Deater was asked as to the occurrence, and asked how many children he was taking
5 care of at the time, and their ages. This evidence was properly admitted to show the circumstances surrounding Deater at a time it was claimed he was improperly consorting with a lewd woman.

The defendant urges in his argument that witnesses were permitted to testify as to Deater's character for honesty. This is a mistake. An examination of the reporter's transcript of the evidence fails to disclose any testi-
6 mony of this kind. Testimony was, however, admitted tending to prove that there was no general talk in the community where Deater lived that he was of lewd character, and associated with lewd women. This was in direct rebuttal of the testimony of the defendant on the subject, and was competent. 1 Greenleaf Evidence, sections 54, 55; *State v. Nelson*, 58 Iowa, 208.

The defendant subpoenaed as a witness in his behalf Judge W. R. Green, for the alleged purpose of proving that Deater was an associate of gamblers, and had interceded in behalf of one who had been convicted before Judge Green. The subpoena served upon Judge Green did not show that it was issued under the order of the judge, as provided in
section 1298 of the Code, and he demanded his fees.
7 The defendant was informed of this demand, but did not tender or pay the same. The witness failing to appear, an attachment was asked, and properly refused. Under the circumstances the court could not compel the attendance of the witness. Code, sections 1298, 4662.

The defendant assigns error in the overruling of his amendment to his motion for a new trial, based upon the misconduct of counsel in the opening statement to the jury.

The taking of this statement by the reporter was
8 waived, and the statement has not been preserved by bill of exceptions, as required by law. Affidavits were subsequently filed setting out the substance of the

alleged prejudicial matter, but these cannot be considered. *Nelson v. Railway Co.*, 77 Iowa, 405; *State v. Clemons*, 78 Iowa, 123; *Knaebel v. Wilson*, 92 Iowa, 536. It appears from the record that the trial judge gave the defendant the full benefit of his recollection of the statement in passing upon the motion, and we discover no error in his ruling thereon.

The indictment charged that the following statements contained in the article were libelous: "*First*, that there has not been a meeting of teachers in this county in which H. E. Deater has presided that the rules of common decency have not been outraged; *second*, that said H. E. Deater is irreligious, an infidel, and an unbeliever; *third*, that said H. E. Deater is vulgar; *fourth*, that said H. E. Deater is dishonest; *fifth*, that it is well known by the people of Page county, and particularly of the town of Shenandoah, that said H. E. Deater opposed the petition of the good-intentioned people of this county who desired congress to legislate so as to have Almighty God recognized in the constitution; *sixth*, that it is currently reported and generally believed that said H. E. Deater contributed an article that is a disgrace to any decent man." The court instructed the jury that, in its judgment, the first, second, fourth, and sixth charges were defamatory in their nature, and their publication would be sufficient to warrant a conviction, unless justified; and that the same was true of the third charge, if it was made in the sense that Mr. Deater "was low, base, and unfit for the society of refined people." This instruction is attacked as to the second, third, fourth, and sixth charges on the ground that none of them are libelous. The statute defines libel to be "the malicious defamation of a person * * * tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse." To constitute libel, it is not necessary that the publication charge

the commission of a crime. Any charge which is within the definition of the statute is libelous. *Halley v. Gregg*, 74 Iowa, 563. Without citing the large number of cases wherein special words have been held libelous under the definition practically adopted in our Code, we call attention to the collection of such cases in Newell, Defamation, pp. 46-60; and Odgers, Libel & Slander, pp. 21, 25. Mr. Deater was at the time of the publication of the article in question a candidate for re-election to the office of county superintendent of schools of Page county, and we have no doubt that each and every one of the charges referred to in the instruction was in itself libelous, except possibly the third, and that the third was libelous if given the meaning stated by the instruction. This conclusion we think amply

10 sustained by well-considered authority, both English
and American. 15 Am. St. Rep., note p. 356. Because of the fact that Deater was a candidate for office, the defendant claimed the publication was privileged. The court instructed the jury on this point that, if the publication was for the "sole purpose" of advising the electors, etc., it was privileged. Complaint is made of the use of the words "sole purpose" in the instruction. The complaint is without merit. The charges were not privileged unless made for the sole purpose mentioned. No man, under the guise of a legal privilege, can be permitted to sow broadcast false and defamatory matter regarding his neighbor, even though he be a candidate for office, unless it be done for the sole purpose of advising the electors who may vote for him of his true character. See *Bays v. Hunt*, 60 Iowa, 251.

Other instructions are complained of, but we cannot consider the matters discussed, because proper exceptions thereto were not preserved, though we may say that we think no error appears.

The defendant's motion for a directed verdict was properly overruled. The question of justification and the shield of privilege were both within the province of the jury to

determine, and were rightly submitted to it. *Nichols v. Eaton*, 110 Iowa, 509.

Complaint is also made of a remark of the trial court that nothing material had been elicited from a certain witness. This does not appear prejudicial under the record. We discover no reversible error. The case is therefore **AFFIRMED**.

THE BURLINGTON PROTESTANT HOSPITAL ASSOCIATION,
Appellant, v. MICHAEL G. GERLINGER *et al.*

111	293
123	90
111	293
134	297

Fraudulent Conveyance: INSOLVENCY: Evidence. Where declarations of a debtor to the effect that certain property conveyed by him was all the property he had are proven, it will be presumed, in the absence of evidence to the contrary, in an action
1 to set aside such conveyance, that such conditions continued to exist down to the time of the commencement of the action, and that the debtor had no property from which an execution could be satisfied.

SAME. In an action to set aside a conveyance as fraudulent as to
1 the grantor's creditors, the plaintiff must show that defendant was insolvent when action was brought

EVIDENCE OF CONSIDERATION. In an action to set aside a conveyance as to the grantor's creditors, it appeared that the grantee's mother willed her a sum of money and that her father, the grantor, was named in the will as executor thereof, that he had never paid the grantee such bequest, that the father had
2 boarded with the grantee, and that she had cared for him, but that there was no agreement as to the compensation for such board and care, and no record was kept of it. It did not appear that her mother left any estate from which the bequest could have been paid, or that the father qualified as executor. *Held*, that the testimony showed such an inadequacy of consideration, and a consideration of such doubtful character as to warrant setting aside the conveyance.

PLEADING. An allegation that a conveyance was made in fraud of the rights of the creditor's grantors, and for the purpose of
3 hindering, delaying, and defrauding them, is in the absence of a motion for a more specific statement, a sufficient allegation that the grantee participated in the fraudulent intent.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

WEDNESDAY, MAY 9, 1900.

THE plaintiff recovered judgment against M. Gerlinger, June 6, 1898, for the sum of one thousand one hundred and thirty-three dollars and sixteen cents and costs, on a note executed by him June 1, 1893, for funds borrowed of certain trustees of the Reformed German Presbyterian Church, of whom he was one. He was then, and continued to be the owner of lot 11 in Highland addition, and the east two acres of lot 5 in Wade's subdivision of section 9, township 69, in Burlington, until about the time the above suit was begun, when he conveyed said property to his daughter, M. R. Hapke, of Quincy, Ill. This is an action to set aside the deed, and subject the premises to the satisfaction of the judgment. The petition was dismissed, and plaintiff appeals.—*Reversed.*

E. S. Huston for appellant.

Chas. Wilner and *C. L. Poor* for appellees.

LADD, J.—This action to set aside a conveyance of certain lots executed by Gerlinger to his daughter March 26, 1896, was begun August 4, 1898. No execution had been previously issued and returned *nulla bona*, and it is insisted at the outset that, for all that appears, the plaintiff might have satisfied its judgment out of other property. True, Gerlinger had, at the time the deed was signed, but not included in it, what is denominated as the "old homestead," subject to a mortgage of one thousand six hundred dollars, and a little money; but this mortgage has since been foreclosed, and the property sold thereunder.

1 Afterwards, but shortly before the suit in which judgment was entered, in an interview with Illick,

by whom it was bought, Gerlinger declared: "I am now a man seventy years old. I have no property but this property, which I deed to my daughter; and I thought I owed it to myself to deed that property to her, and then she should take care of me the rest of my life." Being without means then, his situation, in the absence of any showing to the contrary, must be assumed to continue unchanged. See *Sigler v. Murphy*, 107 Iowa, 129. The controlling inquiry is not as to the extent of his property when the conveyance was made, but at the time this action was begun. *Banning v. Purinton*, 105 Iowa, 642. He then had none of value.

I. Both Gerlinger and his daughter testified the agreed value of lot 11 was three thousand dollars, and that of the two-acre tract five hundred dollars, though Mrs.

Hapke had no knowledge of the worth of either.

2 This is her account of the transaction: "When my mother died on November 17, 1891, she left a will, which gave me three thousand dollars. My father was the executor, and has owed me that money ever since. Then, as I have told you before, my father has boarded with us at Quincy for six years about three months every year, and for that board owed me five hundred dollars. He told me that he did not have the money to pay me for the board, or for the money which my mother had willed to me, and offered to deed me the property in Burlington to pay me for the board, and for what my mother had willed to me, and I agreed to take it in that way." She not only boarded him, but did his washing and mending, and cared for him when sick. No special arrangement or promise had been previously made for her compensation, and neither party is able to give anything more than a mere estimate of the time he was with her each year. The will referred to was executed March 9, 1891, admitted to probate December 21, 1891, and bequeathed one thousand dollars each to Mrs. Hapke and a sister, and in its third paragraph willed to Mrs. Hapke "the sum of \$2,000, of which, however, she shall be entitled to

the interest accruing thereon only during the remainder of the life of my said husband." Gerlinger was named as executor without bond, but never qualified as such, and no inventory or other paper, aside from the will, has ever been filed.

III. It will be noted that no proof was offered that Mrs. Gerlinger left any property at her death, or that any passed into the hands of her husband because of being named executor. No presumption arises from the making of a will that the testator left means out of which legacies bequeathed might be paid. It is a matter of everyday observation that the contrary is often true. Besides, in this case, the fact that Gerlinger never qualified, and no one was appointed to act in his stead during the seven or eight years following the probate of the will, tends to show that there was no property for administration. But, even if there were, the mere naming of Gerlinger as executor in the will did not vest in him any title to the estate on her death. Such would have been the rule under the common law, but not so under the statutes of this state. He (the executor) is a mere trustee, taking nothing in his own right, but everything for others. Sections 3299 and 3300 of the Code provide that, when the probate of a will cannot be immediately granted, a special administrator may be appointed to preserve the estate until full administration is granted. Section 3301 requires qualification by taking oath to faithfully discharge the duties imposed upon him by law, according to the best of his ability, before entering on the discharge of his duties as executor. Thereupon letters are issued by the clerk giving the executor the power authorized by law. Section 3303. Unless the giving of a bond is waived by the testator, the executor must furnish one before entering upon the discharge of his duties. Even if waived, the court may still, in its discretion, require it, and the appointment of an executor may, for certain causes, be rejected, and another substituted by the court. Possibly, the party nominated in

the will may, before its probate, assume care of the estate when necessary for its protection and preservation. *People v. Barker*, 150 N. Y. 54 (44 N. E. Rep. 785). But beyond this his authority is derived from the court and his qualification. In *Shoenberger's Ex'r v. Institution*, 28 Pa. St. 465, it was said: "At death a man's estate really passes into the hands of the law for administration, as much when he dies testate as intestate, except that in the former case he fixes the law of its distribution after payment of debts, and usually appoints the persons who are to execute his will. But even the appointment is only provisional, and requires to be approved by the law before it is complete; and therefore the title to the office of executor is derived rather from the law than from the will." Naming a person as executor does not, as at common law, make him executor in fact upon the testator's death, but ordinarily gives him the right only to become such by compliance with the provisions of the statute. *Stagg v. Green*, 47 Mo. 501; *Wood v. Cosby*, 76 Ala. 558; *Roberts v. Stuart*, 80 Tex. 387 (15 S. W. Rep 1108); *Diamond v. Shell*, 15 Ark. 26; Woerner, Administration, section 172. Gerlinger then cannot be presumed to have acquired the property, if any, left by his wife under her will as executor. The alleged indebtedness of three thousand dollars is based entirely on this supposed obligation, but as none existed, and as no property of the testator is traced into his hands, this part of the consideration for the deed utterly failed. As already stated, there has been no previous talk concerning the payment for board during the six or seven years, which was a part of the agreed price, and the length of time Gerlinger stopped with his daughter each year was a matter of conjecture. Its worth was merely estimated to offset the value of the two acres. Very evidently he had made his home with her a short time each year without thought of compensation, and payment by conveying this property was purely an afterthought. In view of the gross inadequacy of this as a con-

sideration, and its doubtful character, and the other circumstances disclosed, we are of the opinion that the conveyance should be set aside as fraudulent, and the lots subjected to the payment of plaintiff's judgment.

IV. The petition alleged want of consideration, and that the deed "was in fraud of the rights of creditors of the grantor, and made for the purpose of hindering, delaying, and defrauding them." The defendants insist
3 there is no allegation of participation on the part of Mrs. Hapke. The answer specifically denies that this was the purpose in making the conveyance, but, if it was in fraud of creditors, both parties must have participated. We deem the allegation, in the absence of a motion for more specific statement, sufficient.—REVERSED.

CORDELIA M. HOLMES, Appellant, v. HOWARD L. CONNABLE *et al.*

Claims Against Estate: NOT ESTABLISHED AS A MATTER OF LAW. Where a claim against an estate devised to others is based on an alleged oral contract with decedent, and no witness who could deny contract is living, such claim cannot be considered as established, as a matter of law, because witnesses have testified to making of the contract, and none have been called to it, because the defense may arise from the improbability of testimony given.

Evidence. Plaintiff in 1897 alleged that deceased orally promised in 1856, after having known her and her parents but a year, to give her a child's share in his estate. Plaintiff's mother testified that deceased stated to her that, if plaintiff lived with him until grown she could share in his estate with his children, and that he would do as good a part for her as for his own children. There was evidence that the taking of plaintiff by deceased was a relief to her mother, and plaintiff's sister testified to the same promise. Plaintiff lived with deceased until 1865, and, though residing in an adjoining county saw him but once thereafter, and testified to no further conversation relating to the promise. Letters written by deceased were produced and portions claimed to be material, being

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missing, were supplied by plaintiff's testimony, though witnesses testified they saw such written portions several years before, and two witnesses, friends of plaintiff, who had given a chattel mortgage to decedent which had been foreclosed, testified to statements tending to support plaintiff's claim. *Held*, that such evidence was insufficient to support the agreement.

Appeal: DENIAL OF ABSTRACT: *Timely filing not always essential.*

3 Where no prejudice is shown to have resulted from failure to file the denial of an abstract in time, a motion to strike such denial from the files because of such failure will be overruled.

Appeal from Lee District Court.—HON. HENRY BANK, JR.,
Judge.

THURSDAY, MAY 10, 1900.

ACTION in equity to enforce specific performance of an oral promise of one A. L. Connable, now deceased, to give plaintiff a child's portion of his estate. Defendants are the devisees and executors of such estate. From a decree dismissing plaintiff's petition, she appeals.—*Affirmed*.

Moses A. McCoid and H. Scott Howell & Son for appellant.

James C. Davis for appellees.

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WATERMAN, J.—Cases of a similar nature to this are finding their way into the courts with alarming frequency of late years. We have here an attempt to secure, upon oral evidence, a large share of a valuable estate in probate, and the facts given to support it are mostly of such a character as not to be open to direct denial. We shall pass a number of defenses, such as election of remedies, statute of limitations, former adjudication, indefiniteness of the contract, and that it is against public policy, and address ourselves to a consideration of the testimony. And in doing this we shall take the claimant's evidence as she has given it, though part of her testimony should perhaps be excluded, under the

statute. A brief outline of the facts will serve to show the applicability of certain rules of law to which we desire to call attention before proceeding to a critical analysis

1 . of the evidence: One A. L. Connable, a resident of Keokuk, died on the fifteenth day of April, 1894, leaving a will by which his entire estate, of some two hundred and fifty thousand dollars, was devised to his three sons, his only children; and, so far as then appeared, these were the only proper objects of his bounty, for his wife had previously died. Nearly three years after the probate of the will, this claim was first made. Plaintiff asserts that when a small child she was taken into the family of Mr. Connable, with her mother's consent, on an oral promise by him that, if she would remain until she was grown, he would give her on his death a share of his estate equal to that of his own children. This was in the year 1856. There is no dispute but that plaintiff spent some years in the family. We shall accept her statement that she remained until the year 1865. She then left, and went to Jefferson county in this state, where she has since resided. It is conceded that since the year 1865 plaintiff has never visited the Connable family, though they continued to live in Keokuk; that she saw Mr. Connable but once in all this time; that none of his family ever visited her, and there was no communication between her and any of them, save some letters, of which we shall have more to say in proper time. The oral contract is said to have been made in the presence of Mr. and Mrs. Connable, both dead, and of plaintiff, with her mother, brother, and sister. There is also evidence from three witnesses of declarations by Connable to the effect that plaintiff was to share his estate with his children, or that he had agreed she should do so. Some lost and mutilated letters, the contents of which are supplied by oral evidence, are also relied upon to support the claim. This will give an idea of the character of the case presented by plaintiff.

Before going into details, we wish, as already suggested, to say something as to the rules that should govern courts in passing upon cases of this kind. It will not do, as plaintiff's counsel seem to think proper, to hold that because a
2 certain number of witnesses have testified to the making of the contract, and none have been called to deny it, plaintiff's case is established. The lips of the only two witnesses who could deny it are forever closed. The only person who could controvert the admissions alleged to have been made is the dead man against whose estate this claim is produced. There is no defense that can be made, save as it may be found in the improbability of the stories of the plaintiff's witnesses, when tested by comparison with other evidence in the case, or the ordinary rules of human conduct under similar circumstances. *Watson v. Richardson*, 110 Iowa, 673; *Laurence v. Laurence*, 164 Ill. Sup. 367 (45 N. E. Rep. 1073); *Wallace v. Rappleye*, 103 Ill. 229, 665. In this last case, which bears some similarity to the one at bar, in its facts, the court said in relation to the oral evidence offered: "It is incumbent on the court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth." So, on the same subject, the supreme court of Pennsylvania said: "The temptation to set up claims against the estates of decedents—particularly such decedents as have left no lineal heirs—is very great. It cannot be doubted that many such claims have been asserted which would never have been known, had it been possible for the decedent to meet his alleged creditor in a court of justice.
* * * Such claims are always dangerous, and when they rest upon parol they should be strictly scanned. Especially when an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes, or that which the decedent had directed by his will, it should

meet with no favor in a court of law. Even if such contract may be enforced, it can only be when it is clearly proved by direct and positive testimony, and when its terms are definite and certain. The danger attendant upon the assertion of such claims requires, as was said by Chief Justice Gibson in reference to a somewhat similar contract, that a tight rein should be held over them, by making the quality, if not the sum, of the proof a subject of inspection and governance by the court, and by holding juries strictly to the rule described." *Graham v. Graham's Ex'rs*, 34 Pa. St. 481. See, also, *Pollock v. Ray*, 85 Pa. St. 431; *Shakespeare v. Markham*, 72 N. Y. 403; *Mundorff v. Kilbourn*, 4 Md. 459. Bearing these rules in mind, we shall now take up the testimony in detail:

Plaintiff's father, Stephen Finney, was a brother of Mrs. A. L. Connable. He died in the year 1855 in the state of Alabama, where he then resided with his family. His father, who lived in Jefferson county, Iowa, sent the widow a small sum of money; and, thus aided, she started in the year 1856 for the grandfather's home. Mrs. Finney (now Holmes) had seven children, and these she brought with her. Plaintiff, the third child, was at this time nine years old; her elder brother and sister being, respectively, eleven and thirteen years. The family reached Keokuk on the night of a Saturday in May, 1856. None of them had ever met Mr. Connable, but on Sunday morning two of the children were sent out to find him. This they did, and he took the whole family from the hotel where they were stopping to his home, where they remained until the Tuesday following, when the mother and six children pursued their journey, leaving plaintiff behind. The claim is that on Monday Mr. Connable proposed keeping the plaintiff, and after some consideration the mother and child consented. The terms upon which the child was taken are thus stated by the witnesses: The mother says: "My older children were present, and Mrs. Connable. I was talking about leaving the next day,

and he [Mr. Connable] said I had better leave Cordelia with him. I told him I would hate to give up one of my children, but would study about it awhile. He did not say anything more until afternoon, and then he asked me if I had made up my mind to let Cordelia stay; if I would let her stay with them until she was grown, she would share equally with his children in his estate at his death." On cross-examination she tells of the agreement in this way: "Mr. Connable wanted to know if I would leave Cordelia with them, as one of the children; if I would, he would do a good part by her as he would by one of his own children, if she would stay there until she was grown." If the agreement was in the indefinite form last stated, no court would enforce the claim to an interest in the estate. It might well mean only that he would treat her as a child of his own so long as she remained with him. But, take the statement made on direct examination, and we have this man, with children of his own, offering to divide their inheritance with a strange child, of whose disposition and character he was wholly ignorant. That this is a strong circumstance to be considered, see *Wilson v. Heath* (Sup.) 53 N. Y. Supp. 168. If the offer was merely of a home to one of the children, we can well believe it might have been induced by pity for the condition of the family, and because of the slight bond of relationship that existed. There seems to be a claim by counsel that the mother would not have parted with her child but upon a liberal promise as to its future welfare. We can hardly reconcile this with the fact that about a year from this time she parted with others of her children, who left her to live with different friends and relatives in the vicinity of her home. That her maternal love was not of the most sensitive and tender kind is further shown by the fact that two of her daughters (one the plaintiff) were married near where she resided, and she did not attend either wedding. She says, "I was not in the habit of attending my daughters' weddings." We can well believe that the tak-

ing of her daughter Cordelia by Connable was a relief to her, rather than a sacrifice.

We come now to the testimony of the three children who were present when these conversations occurred:

Laura, who gives her evidence in the state of Oregon, where she resides at present, was thirteen years of age when Cordelia was taken. In 1897, after a lapse of more than forty years, she remembers that Connable promised that her sister "should share equally in his estate, as one of his own children." In one of her letters written while arrangements were being made to take her testimony, she says, speaking of the occurrences at Keokuk: "I was young,—thirteen years old; had the care of the other children; and, amid the confusion, I at the same time trying to hear the agreement, could not catch all that was being said. * * * My health is bad, and memory poor." Notwithstanding her poor memory, the witness repeats Connable's promise in almost the same words used by her mother, brother, and sister; and on cross-examination she is led to recall one remark of Connable which none of the others mention. He said: "He had property, and would leave her [Cordelia] a fortune." There is one criticism of the testimony of this witness which applies equally to that of the other children. They were all of an age in 1856 when considerations of gain would not console them for a forced separation. The love of a child cannot be bought, nor its grief assuaged, by alluring prospects of the future. It lives in the present, and knows but little either of joy or sorrow from the time

One would naturally suppose that on such a try-
ion, when one of their number was to be left with
, the agony of the parting would exclude from their
the sordid considerations by which it was brought

odore Finney, the brother, who was eleven years of
. the transaction occurred, about which he testifies,
rs definitely but little of the visit to Keokuk;

makes a mistake as to the day of their arrival, as to the time of meeting Connable and going to his house, and the length of their stay there; but, through all the vicissitudes and changes naturally incident to the long period that elapsed between that time and the date of giving his testimony, he has retained with startling accuracy in his mind the fact that Connable said his sister should "fare and share equally with his children at his death." It was a part of the conversation in which a child would have no interest, and it is the only part which he distinctly remembers.

The plaintiff is the last witness to the alleged contract. Her youth would seem to render it improbable that she could recall any of the business details, but she is able to repeat just what each person said. Connable's promise was that on his death she should "fare and share as one of his children." Indeed, this witness was so precocious that she noticed just the part she took in the conversation, and, strange to say, it chanced to be such a part only as to give some ground for counsel's claim that she is not disqualified under the statute. She never spoke, she says, until the contract between her mother and Connable was made, and then she consented to stay. Had the child been looking to preserving her competency as a witness in anticipated litigation after Connable's death, her conduct could not have been more discreet. The witness says she remembers the conversation as well as if it had occurred "last week;" that ever since it took place she has kept in mind the fact that she had a contract which was performed on her part. Yet, in a letter to one of the defendants, after Mr. Connable's death, she says: "I was to share equal had I stayed until I was 18 years. I was past 17 when I left." She left Mr. Connable in 1865, and, although she resided thereafter in an adjoining county, never visited Keokuk but once, and that was in 1892, when she was called to Montrose, some twelve miles distant from Keokuk, by the

illness of a relative, and went on to the latter place, and stopped over between trains. She saw Mr. Connable then, and, with the exception of some letters of which we shall next speak, this was the only communication between them during the years that passed after she left his home. She claims that Mr. Connable wrote her many affectionate letters after her departure. Most of these, she says, were destroyed. We can allow this part of the testimony no weight. She produces five letters. Three of them relate to a second-hand sewing machine which he sent her in response, evidently, to a begging letter. Another, written in reply to a letter from her complaining of an injury she had received in an accident, contained an inclosure of five dollars as a Christmas present. The fifth of these epistles deserves more attention. It affords a key to the character of plaintiff's case. It was in a mutilated condition,—said to have been gnawed by mice,—and the only part of any importance is what does not appear. We have a photographic copy before us, and will try, by reproducing words and lines, to give some idea of the document and its condition. We shall copy only such part as is sufficient to make the testimony understood, for there is only one paragraph that is material.

“Keokuk Iowa Oct. 23 1889.

“Mrs. Cordelia Holmes.

“My dear Niece.

“Your very kind and affec——at——this
m _____ I am _____

_____ you
may never suffer for the want of bread and clothing, for yourself and children. You say you owe Mr. Risk \$35 balance on your sewing machine and through,” etc.

Plaintiff testifies that the blanks shown were originally filled so that the letter read: “Your very kind and affectionate letter due this morning. I was very glad to hear from you. I am going to arrange my affairs and will you

money enough, that you may never suffer for the want of, etc. In this she is corroborated by several witnesses who claim to have read the letter at the time it was received, and who testify from independent recollection of what they saw in it in 1889; for the letter was put away shortly after its receipt, and not seen again until 1894, when it was found in its present condition. Indeed, one of the witnesses did not see it after reading until 1897. Aside from plaintiff's husband, who gives only the substance, the other witnesses, with one exception, agree exactly as to the missing words. It is an amazing exhibition of memory. Two of these witnesses are daughters of plaintiff; another, a sister-in-law; and finally her husband, of whom we need only say that, if he is the kind of person plaintiff describes him as being, in her letters to Connable, we can well believe his interest might color his recollection. It is a singular fatality that the vital sentence in this letter should be the one that is missing. But, whatever the words were that originally filled the spaces we have left blank, we feel confident they were not the ones which plaintiff seeks to insert. A business man would hardly use the word due for "received," yet most of the witnesses unite in saying that was the form of expression. In view of various letters written by plaintiff to defendants, and introduced in evidence, we may well conceive that the epistle to which this letter of Connable's is a reply was one pleading poverty. If this is so, the blanks might reasonably be filled with an expression of regret on the writer's part for her condition, and a hope that she might not suffer, etc. He was bound by a contract, as plaintiff says, to give her the one-fourth of his estate. There was, therefore, no call for him to say that he would will her enough to keep herself and family from suffering for bread and clothing. Another circumstance worthy of notice is that, while the writer is promising here to will her a share of his estate, the will was then in existence, whose terms she now seeks to set aside. There is no evidence that any in-

fluence was exerted upon the testator to balk his intention. He wished to give plaintiff a share of his estate. He had time and opportunity to put this intention into effect, but he never did so. But we do not rest our criticism of this letter here. Taking the fac simile as we have it in the record, we find that the average number of words on a line is six; in most cases, where the words are of ordinary length, there are but five; in only three instances on its two pages, and where the words used were short, we find seven; never more than this. Now, if we fill the third, fourth, and fifth blank lines with the words sought to be supplied, we have twenty-three words, or eight for each of two lines and seven for the other, and many of them words of more than ordinary length. In the blank in the third line, especially, it appears impossible to insert the words claimed as missing. Altogether, this letter has such a suspicious look that we do not feel warranted in allowing it any weight. It is the only document produced that is of any importance, and upon the issue involved it cannot speak for itself. We have in it nothing, after all, but the oral testimony of interested parties and relatives, to an improbable statement.

II. But it is claimed that plaintiff's case is supported by the testimony of disinterested witnesses, and we turn our attention now to that branch of the controversy. Andrew Brown, eighty-eight years of age (a mere acquaintance of decedent), testifies that in 1856 Connable talked of taking one of his daughters; spoke jestingly of trading one of his own boys for a daughter of Brown; said he would give Brown's daughter an equal share of his estate. Two years later Brown saw a little girl on the porch of Connable's house, and asked if she was going to stay. Connable replied that she was, and added: "If she stays with me until my death, I will make her an heir of my property, the same as my other children." This old man says his memory is not good, but it is only a memory marvelously retentive that could preserve accurately through so many years

such a trivial incident. It will be noticed that what was said does not conform to the promise claimed by plaintiff to have been made by Connable, and also that it is expressive of an intention, rather than an obligation. Mr. and Mrs. McIntosh (the latter a long-time friend of plaintiff) also testify to declarations made by Connable. It is proper to preface what they say with the statement that some of their furniture was taken under chattel mortgage by one of the devisees or the executors of the Connable estate. These parties rented a house from the deceased, but they had no previous intimate acquaintance with him. The wife had never even spoken to him before the time when he made her his confidant. Yet they would have us believe that on three occasions (once to the husband, and the other times to the wife) Connable told that about his private affairs which he never divulged to any of his many close friends and associates. What he said, in effect, was that plaintiff was to share in his estate. The first two conversations are fixed as having occurred in 1891, when plaintiff had been absent for twenty-six years, during which time Connable had never seen her. The third conversation is said to have been with Mrs. McIntosh, at her house, on the day of the school election in 1894, but there is evidence to show that at this time Connable was so ill that he could not have left his home. On this last occasion Connable is represented as saying to this woman: "There is Cordelia. I have not yet attended to her business, and she knows and you know I promised to make her share equally with my own children." A singular expression, for this witness knew nothing of the matter, save what Connable had told her. A singular anxiety, too, about a duty which could have been performed by adding a line or two to his will. But, if we accord all honesty of purpose to such witnesses, it must be remembered that these are admissions made in random conversations. This court has said: "Than this, no species of testimony is more dangerous, or received with

greater caution." *Cooper v. Skeel*, 14 Iowa, 581. See, also, *Wilmer v. Farris*, 40 Iowa, 310. 1 Greenleaf Evidence, section 200. This is the plaintiff's case. That Connable, when he took her into his family, agreed to treat her as one of his own children as long as she remained, is quite likely, and it appears that he so did treat her. That he promised anything more than this is rendered improbable by every circumstance of the transaction, and by the conduct of all parties during the years after plaintiff left his house. These improbabilities are not overcome by the dubious testimony offered to support the claim made.

After a careful consideration of the facts, we are forced to the conclusion that the decree of the district court, dismissing plaintiff's petition, was fully warranted. The
3 motion to strike the denial of appellee's abstract because not filed in time will be overruled. No prejudice appears to have resulted from the delay.—AFFIRMED.

MURTY FARRAHER V. THE CITY OF KEOKUK, Appellant.

Public Improvements: RECONSTRUCTION AND REPAIR: *Assessment for permanent sidewalk.* Code, section 779, confers on cities power to provide for the construction, reconstruction, and repair of permanent sidewalks, and to assess the cost thereof on abutting lots, and that such improvements shall be made only on petition of the owners of the majority of the frontage. Section 780 provides that cities shall have power to repair sidewalks without notice to owners and assess the expense thereof against the property. The city engineer caused a brick walk, which had been out of repair, to be taken up, a new trench dug, and an entirely new foundation of sand laid therein, and a large number of new brick to be used in relaying the walk. *Held*, to constitute a re-construction, and not a repair of the walk, which the city was authorized to make without a petition of the majority of the frontage, and that, hence, assessment therefor was void.

Appeal from Keokuk Superior Court.—HON. RICE H. BELL, Judge.

THURSDAY, MAY 10, 1900.

PLAINTIFF, the owner of a certain lot in the defendant city, brings this action to enjoin the sale of said lot for non-payment of a special tax levied against it by the defendant, on the ground that said tax is illegal and void. Defendant answered, in effect denying that the tax is illegal or void, and on hearing had a permanent injunction was granted as prayed. Defendant appeals.—*Affirmed.*

Hazen I. Sawyer for appellant.

Ballinger & Wilson for appellee.

GIVEN, J.—I. The city of Keokuk existed under special charter, but the sections of the Code to which we will refer are made applicable thereto by section 958. Section 779 confers "power to provide for the construction, reconstruction and repair of permanent sidewalks and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed." It is further provided in said section: "But unless the owners of a majority of the linear feet of the property fronting on the improvements referred to in this section petition the council therefor, the same shall not be made unless three-fourths of all the members of the council shall by vote order the making thereof." Section 780 is as follows: "Cities and towns shall have power to repair sidewalks without notice to the property owners, and assess the expense thereof on the property in front of which such repairs are made, and the same shall be certified and collected as other taxes." Section 441: The Revised Ordinances of the city provides as follows: "There is hereby created and established the office of sidewalk commissioner. The duties of said office

shall be performed by the city engineer." Section 442: "It shall be the duty of the city engineer, acting as said commissioner, to perform all the duties devolved upon him by the chapters relating to sidewalks and have all labor upon the sidewalks ordered by the city council performed in accordance with the chapter relating thereto; make all ordinary repairs on sidewalks as the city ordinances provide, and see that the same are kept in good safe condition for the public travel, subject to instructions and directions of the sidewalk committee; to oversee the construction and maintenance of all sidewalks now in, or that may be ordered by the city council. And whenever it is necessary to rebuild or construct any sidewalk he shall report the same to the sidewalk committee, who shall, if in their judgment such improvement is necessary, prepare and offer a resolution to the city council ordering such improvement as provided for by ordinance. He shall report all violations of ordinances relating to sidewalks to the sidewalk committee, and be authorized and empowered under the instructions of the committee to employ competent men and procure material to make any repairs or construct any may have been ordered as herein provided." On 11, 1896, and again on April 14, 1897, the city caused notice to be served on the plaintiff as follows: "You are hereby ordered to repair brick walk in the above-described property on Fifth street by repairs and placing in good condition, and drain from ice-house so it will not injure the sidewalk. Repairs to be made within ten days after service hereof. Attest of sidewalk committee. G. M. Walker, City Engineer." The plaintiff disregarded the notice, and thereupon the city engineer caused the walk to be put in order by Ausdall, who reported the cost to be forty-eight dollars and forty-four cents, and the lot was assessed that amount. It will be observed that the city engineer had authority to repair sidewalks without notice to the property

owner, and assess the expense thereof," but in case of construction or reconstruction a petition from the owners or a vote of the council is required. There was no such petition or vote, and the question discussed is whether this sidewalk was repaired or reconstructed.

II. As to the condition of the walk the city engineer testifies: "I examined sidewalk, and found same in great need of repair, from near the curb line of Des Moines street, one hundred and thirty-four feet towards the alley, between Des Moines street and Timea street. Bricks were in numerous places broken and crushed. The walk was low, and covered with mud and clay. Holes which held water existed all over said walk. Part of said walk had been used for the purpose of driving heavy ice-wagons over, and the walk was crushed, broken, and in dangerous condition." Mr. Van Ausdall testifies to the same effect. He also testifies: "We took up the entire sidewalk for 134 feet, and redug the trench again, and put back what old sand was left, which was very little, and put in 11 cubic yards of new sand; that is, there wasn't any sand there went back in there. There was nothing in it but mud. No sand went back only what we put in. There was none of the old sand went back. We took out all the old bricks, threw out the old sand, redug the trench, and put new sand back in there, under the bricks. Then we relaid the walk entirely for a distance of 134 feet, and in that we used about 2,700 new brick." Again he says: "We probably used some of the old bricks in the end in every other row. Taking the walk as a whole, there wasn't many of the old bricks used." "Repair. To mend, add to, or make over." "Reconstruct. To construct again; rebuild." Standard Dictionary. "Repair. Restoration to a sound or good state after decay, waste, injury, or partial destruction; supply of loss." "Reconstruct. To construct again; to rebuild." Webster Dictionary. The old sidewalk was not mended, made over, nor restored, but was rebuilt, reconstructed; which seems to have been the only proper rem-

edy. There are no special equities in the plaintiff's claim, and yet the law is unquestioned that in exercising the taxing power the city must pursue the manner pointed out in the statute. *Chicago, R. I. & P. R. R. Co. v. City of Davenport*, 51 Iowa, 451; *Tallman v. Treasurer of Butler County*, 12 Iowa, 531; *McManus v. Hornady*, 99 Iowa, 507. There are manifest reasons why the cost of mere repairs is allowed to be assessed in a more summary manner than the greater cost of reconstructing sidewalks. The decree of the superior court is in accordance with the law, and it is **AFFIRMED.**

ANGUS McCORKENDALE *et al.* v. MARY McCORKENDALE
et al., Appellants.

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Bastards: RECOGNITION: Sufficiency. Statements, made by one charged with being the father of a child born out of wedlock,
1 that he had a boy somewhere, that the mother of the boy had been ruined by him, that the mother was pregnant, and that he was going to send her money, did not constitute the general and notorious recognition of the child necessary under the statute, to entitle it to inherit from the father.

Evidence: TRANSACTION WITH DECEDENT. Under a statute prohibiting the examination of a party to an action in regard to any personal transactions between such persons and a person
2 deceased at the time of the examination, parties defendant in an action by an heir to quiet title to inherited land where the defense is made that the land was inherited by a bastard child of the decedent, will not be allowed to testify to transactions, conversations, and illicit relations with deceased.

SAME. Under a statute prohibiting a party from giving testi-
3 mony of communications with a person deceased before the commencement of the examination, letter of the deceased written to a party are inadmissible.

Appeal from Sac District Court.—HON. S. M. ELWOOD,
Judge.

THURSDAY, MAY 10, 1900.

ACTION in equity to quiet the title to land. There was a trial upon the merits, and a decree for the plaintiffs. Defendants appeal.—*Affirmed.*

M. W. Beach for appellants.

W. A. Helsell for appellees.

SHERWIN, J.—On the seventeenth day of May, 1896, Neil McCorkendale died intestate, seised in fee of the land in controversy. He left surviving him his widow, Mary McCorkendale, one of the defendants herein. No children were born to Neil and Mary McCorkendale. The parents of the deceased died before the seventeenth day of May, 1896. The plaintiffs are his brothers and sisters, and brought this action to quiet their title to the undivided one-half of the land in question; alleging that one Janet Armour, and her son, Lawrence Armour, were in possession of a part of the land, claiming an interest therein adverse to the plaintiffs. Each of the defendants, Mary McCorkendale, Janet Armour, and Lawrence Armour, filed a separate answer, all alleging that Lawrence Armour is the son of Janet Armour and the illegitimate son of Neil McCorkendale, and alleging further that Neil McCorkendale during his lifetime had recognized him as his child, in writing and otherwise, and that such recognition was general and notorious. Based upon the facts so plead, Lawrence Armour claims to inherit two-thirds of the estate of the deceased. Janet Armour and Mary McCorkendale, the widow of the deceased, are sisters. They were also first cousins of Neil McCorkendale. Janet lived with deceased and her sister in Sac county from June, 1883, until about April 23, 1885. It is proven that Lawrence Armour was born in Joilet, Ill., April 28, 1885, and lived there with his mother eight years, and that she, with the child, thereafter moved to Minneapolis, Minn. It is

conceded that Neil McCorkendale never saw Janet Armour after she left Sac county, in 1885, and that he never saw Lawrence Armour, and that neither the mother nor the child was ever in this state after his birth until subsequent to the death of Neil McCorkendale. It is proven beyond question that Janet Armour is the mother of the defendant Lawrence Armour, and that he was born out of wedlock. There is also some competent evidence in the record which tends to show that Neil McCorkendale was his
1 father. The questions, however, which we have to determine, are whether Neil McCorkendale recognized Lawrence Armour as his son, and, if he did, whether such recognition was the general and notorious recognition required by the statute, or whether the recognition was in writing, as claimed. Lexicographers say the word "general" means "common to many or the majority; extensive though not universal,"—and that "notorious" means "generally or commonly known, acknowledged, or spoken of." That it was quite generally understood in the community where Mr. McCorkendale lived that Janet Armour had given birth to a child, and that he was the father, we think is abundantly proved by the record. But the record falls far short of proving that he recognized the child as his. It is shown that he partially admitted to one of his acquaintances that he had a boy somewhere. To another he stated he had ruined Janet Armour, and that she was pregnant; to a third, that Janet had "played the devil," and "was going to have a young one," and "that he was going to send her money." It is shown that the community where deceased lived at this time was a thickly-settled one, and it cannot be said that these statements, given their broadest meaning, constitute the general and notorious recognition required by the statute. The written recognition relied upon consists of letters claimed to have been written to Janet Armour by deceased, only one of which was produced upon the trial. This is dated at Odebolt, Iowa, April 23, 1896, and begins, "Dear

Janet," and purports to have been signed by Neil McCorkendale, and witnesses were called who testified that the signature thereto was genuine. The letter contains this language: "I am thinking on you every day, and it is in my mind all the time to have you so far away alone among strangers, but I hope the boy will be good to you when he gets older. If he takes after me, he will. * * * I think, when the boy will be old enough, it will be better for you both to be on a farm. * * * You wanted to know if John showed me the boy's picture. He never mentioned it to me. If he got it, I never heard any one say, but I have the picture here before me, and I think it very pretty. He looks like yourself more than like me." Below the signature to the letter was written in the Gaelic language a sentence which, translated into English, means, "You are my best love forever;" and, in English: "Write as soon as you can. Goodby, with love to both, and kiss for my boy." In connection with this letter an envelope was offered in evidence, addressed to Miss Janet Armour, Minneapolis, Minn., which was postmarked: "Odebolt, Apr. 7, p. m., 1896, Iowa." It is conceded by appellants that without explanation the above letter would be to some extent, at least, unintelligible. We fully agree with this conclusion, and unless there is legal evidence identifying the letter itself, and proving that it was received by Janet Armour, and explaining its meaning, it must be held not to furnish written recognition by Neil McCorkendale of Lawrence Armour as his son. The necessary evidence to make this letter intelligible and material, and to prove that it was received by Janet Armour, was offered in the testimony of Janet herself. Her testimony as to sexual intercourse with Neil McCorkendale was also offered. To all of this testimony the objection was made that her testimony as to personal transactions or communications between herself and the deceased was incompetent. The statute says that "no party

to any action or proceeding shall be examined as a witness in regard to any personal transactions or communications between such witness and a person at the commencement of such examination deceased," etc. Janet Armour was a competent witness as to many things that she did testify to, and when she was interrogated as to any matter within the inhibition of the statute the objection was promptly made. We think it was sufficient in form and timely. The witness was a party to the suit, and could not testify as to personal transactions or communications between herself and Neil McCorkendale. *Williams v. Barrett*, 52 3 Iowa, 641; *Burton v. Baldwin*, 61 Iowa, 283. That the letters she claimed to have received from him are within the prohibition of the statute is well settled, and it would seem hardly necessary to cite authorities, so plain is the language of the statute itself, which is broad enough to, and must be held to, embrace every communication, whether written or oral, direct or indirect. *Dysart v. Furrow*, 90 Iowa, 59; *Martin v. Shannon*, 92 Iowa, 375; *Cole v. Marsh*, 92 Iowa, 379; *Kroh v. Heins*, 48 Neb. 691 (67 N. W. Rep. 771); *Van Vechten v. Van Vechten*, 65 Hun, 215 (20 N. Y. Supp. 140); *Holcomb v. Holcomb*, 95 N. Y. 316; *Holliday v. McKinne*, 22 Fla. 153; *Sabre v. Smith*, 62 N. H. 663. What has been said with reference to the testimony of Janet Armour applies also to that of Mary McCorkendale, the widow, who is also a party, and attempted to testify, over the objection of plaintiffs, as to statements of deceased regarding this boy.

Mary McCorkendale, in a cross petition, claimed that certain of this land had been deeded to her by her husband some time before his death. Reference only is made to this in argument. The trial court denied her the relief prayed, and we think rightly so. The other questions raised by appellees we need not discuss. The decree is AFFIRMED.

C. A. CHURCH v. W. R. BLOOM, Appellant.

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Conversion by Tenant: PLEADING. Under Code, section 2992, declaring that a landlord shall have a lien for rent on all crops grown on the leased premises for six months after the expiration of the term, a petition to recover for the conversion of oats raised by the tenant on the premises leased, and sold by
1 him to defendant, alleging the making of the lease at an agreed and unpaid rent, the raising of the oats during the term, and showing suit brought within six months after the rent accrued, was not demurrable for failure to allege that the landlord's claim had been adjudicated and his lien established.

ESTOPPEL. In action for conversion of oats on which plaintiff had a landlord's lien for unpaid rent, evidence that the tenant had sold defendant grain in previous years, while he had held the
4 land under similar leases, was insufficient to estop plaintiff from asserting his lien on the oats, where defendant, where purchasing the grain previously sold, had no knowledge where it had been raised or that it had been grown on leased land, and it appeared that the landlord had not relied on the tenant's personal responsibility

EVIDENCE. Where land was leased by separate and independent leases for each of several years, evidence that the tenant had sold live stock raised on the land, prior to the year for
2 which suit was brought to enforce the landlord's lien for unpaid rent, was inadmissible, since such live stock was covered by a different lien from that relied on.

ORDER OF PROOF. In an action by a landlord for the conversion of oats raised on the leased premises, against which the landlord had a lien for unpaid rent, and sold by the tenant to defend-
2 ant, the rejection of the defendant's offer to prove that the tenant had sold hogs raised on the premises during the lease term was proper, in the absence of an offer to show that plaintiff had notice of such sale.

HARMLESS REJECTION. The erroneous rejection of evidence was harmless, where the facts sought to be proved were otherwise
3 fully shown during the trial.

Appeal from Hancock District Court.—HON. J. C. SHERWIN, Judge.

THURSDAY, MAY 10, 1900.

ACTION at law for the conversion of personal property. Trial to a jury. Directed verdict for plaintiff, and defendant appeals.—*Affirmed*.

J. E. Wichman and *F. E. Blackstone* for appellant.

Ripley & Kelly for appellee.

DEEMER, J.—The property in controversy is a quantity of oats purchased by defendant from one Munson, who was a tenant of plaintiff, occupying the land on which the oats were raised. It is conceded that Munson was a tenant of plaintiff during the year 1896, and that he raised the oats in controversy on the leased premises; that no part of the rent reserved had been paid at the time this action was commenced; and that defendant purchased oats to the value of two hundred and five dollars and fifty cents.

The ruling of the trial court on a demurrer to the petition is made the basis of the first assignment of error. This demurrer was on the ground that plaintiff was not
1 entitled to recover because the petition did not show that his claim for rent had been adjudicated and his lien established. The petition alleged the making of the lease; the agreed rental; that the same had not been paid; that oats were raised during the term of the lease; and it appears that the action was brought within six months from the time the rent accrued. Under such a state of facts, the statute gives plaintiff a lien. Code, section 2992. And it is elementary that one having a lien on property may sue for its conversion. *Holden v. Cox*, 60 Iowa, 449; *Blake v. Chas. Counselman & Co.*, 95 Iowa, 219; *Nickelson v. Negley*, 71 Iowa, 546.

II. Defendant pleaded that plaintiff, with knowledge of the fact that his tenant was disposing of property raised

or kept on the demised premises, made no objections thereto, but permitted him to do so, and relied on the personal
2 responsibility of the tenant; and by reason thereof has waived his lien, and is estopped from asserting the same. It appears from the evidence that plaintiff leased the land to Munson during the years 1893, 1894, 1895, and 1896, but there was a separate and independent lease for each year. Defendant offered to show that Munson sold hogs raised on the place in the year 1896, and that he also sold hogs, cattle and other live stock raised during previous years. Objection to this line of evidence was sustained. He was permitted to show the sale of crops grown during each and all of these years, but there was no direct evidence that plaintiff had notice or knowledge thereof. The objections to the questions propounded to elicit the fact of the sale of live stock were properly sustained, for two reasons: *First*, because this property was covered by a different lien from that relied on in this case; and, *second*, there was no evidence offered, nor did defendant propose to show, that plaintiff had notice thereof. Under the rule announced in *Blake v. Chas. Counselman & Co. supra*, such evidence was inadmissible.

III. Rulings on the rejection of evidence offered by defendant through the plaintiff, Church, are complained of. As the facts defendant proposed to prove
3 by the questions propounded were fully elicited, no prejudice resulted.

IV. While there is evidence to show that the tenant sold grain during the years 1893, 1894, and 1895 to defendant and various other parties, and that plaintiff made no objection to such sales, either to the tenant or to the purchasers, yet there is no showing that plaintiff relied in any
4 manner on the tenant's personal responsibility, as in *Wright v. E. M. Dickey Co.*, 83 Iowa, 464. In fact, the undisputed evidence is to the contrary.

Moreover, defendant, when he purchased grain raised by the tenant during the previous years, had no knowledge as to where it was raised, or that it was grown on leased land. Without such knowledge, there is no basis for his plea of estoppel. As there were separate and independent leases, what was done under one lease would not of itself be of controlling importance as to another. There is no evidence of any sales from the crop of 1896 previous to that made to defendant. On this state of the record, the trial court was right in directing a verdict for plaintiff. *Meyer v. Houck*, 85 Iowa, 319. The case is ruled by *Blake v. Chas. Counselman & Co.*, *supra*, and other like cases. The judgment is **AFFIRMED.**

SHERWIN, J., taking no part.

M. S. FLEISHMAN & Co., Appellants, v. M. VER DOES AND LENA VER DOES.

Settlement of Claim by Agent: AUTHORITY: Ratification. Where an indebtedness was settled and receipted for in full by plaintiff's agent on acceptance of a note for a lesser amount and a mortgage securing the same, which notes and mortgage were turned over to plaintiff, who kept the same, and never tendered their return, though advised by defendant's answer, filed within
 1 three months thereafter, of the cancellation of the indebtedness, and their procurement by means thereof, no recovery could be had for the balance of such indebtedness nine months thereafter, though such cancellation was without authority, since the acts constituted a ratification.

Special Interrogatories: It was not error to refuse to submit a special interrogatory to the jury concerning the authority of
 2 an agent, when the act of the agent sought to be repudiated had been ratified.

SAME. Where defendant claimed that an understanding she was to pay a balance on an account was made after settlement, and without consideration, and plaintiff claimed it was made before
 3 settlement, it was not error to refuse to submit an interrogatory so framed that the answer would not have indicated

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whether such understanding was before or after settlement, since such answer would not have found an ultimate fact, determinative of the case.

Appeal from Sioux District Court.—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, MAY 10, 1900.

ACTION for balance due on account. Defense, settlement. Judgment for defendants. The plaintiffs appeal.—*Affirmed.*

Hatley & Irwin for appellants.

P. D. Van Oosterhout and *J. E. Orr* for appellees.

LADD, J.—The original indebtedness of one thousand two hundred and fifty-seven dollars and ninety-three cents is not disputed, and the evidence without conflict shows the execution of the ten notes of forty-five dollars each, secured by a mortgage covering the defendants' homestead, and that, by agreement with plaintiffs' agent, there was indorsed on their itemized account: "Received \$450 in full settlement of above account. Feb. 15, 1897. M. S. Fleishman & Co." The issue as to whether, as a part of this agreement, the defendants were to pay the balance of the account, notwithstanding this receipt, was disposed of by the verdict. But the plaintiffs contend that their agents had no authority to settle for less than the amount due. Conceding this to be true, yet the acts of the agents have been fully ratified. The defendants' answer, filed within three months after the alleged settlement, advised the firm of the terms under which the notes and security had been received, and, though the authority of the agents to take them in full payment is denied in the reply, these were never offered to be, or in fact, returned. The principal may not repudiate the agent's authority, and at the same time retain the benefits derived from its exercise. By

keeping the notes and mortgage nine months after being advised of the method of their procurement, and not tendering their return, though defense in the action was based on the alleged cancellation of the indebtedness, the plaintiffs approved of what had been done in acquiring them. *Construction Co. v. Maiken*, 103 Iowa, 118, and cases cited. See *Casady v. Insurance Co.*, 109 Iowa, 539.

As taking the security in full satisfaction of the debt, if this was done, was ratified, it is unnecessary to inquire into the correctness of the instructions given. Nor was there error in refusing to submit a special interrogatory concerning the authority of the agents, as that was put beyond dispute by the retention, with knowledge, of the fruits of the agency. The other interrogatory was not sufficiently definite, and a response by the jury would have been of no advantage.

The defendant admitted an understanding that she was to pay the remainder of the account at some future time, but claimed it was had after settlement was completed, and without consideration. The plaintiffs insisted it was before. The question was so framed that the answer would not have indicated whether before or after, and hence, if made, would not have found an ultimate fact determinative of the case.—AFFIRMED.

BANKERS' IOWA STATE BANK AND EARLE & PROUTY v. W. N. JORDAN *et al.*, Defendants. A. DAVEY *et al.*, Interveners, Appellants.

Attorneys Fees: SEPARATE NOTES. Under Code, section 3869, providing that in an action on a written contract providing for attorney's fees the amount allowed shall be fixed according to a specified graduated scale, where a judgment was entered on several notes declared on in separate counts of a petition, and executed at different times, it was proper to compute attorney's fees on each note separately, rather than on the total amount of the notes, though by such method of computation the allowance was increased.

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RETURN DAY. The second day of the term for which a suit is brought is return day, within Code, section 3869, providing that
3 one-half the amount specified therein for attorney's fees shall be allowed if the money sued for is paid before return day, and three-fourths if paid after return day.

Retaxation of Costs: ATTORNEY FEES. Code, section 3862, providing that the clerk may tax certain costs, and any other sum which
1 the court may have awarded as costs, includes the taxing of attorney's fees, and hence they may be retaxed by the court, on motion.

Appeal from Jasper District Court.—HON. A. R. DEWEY, Judge.

FRIDAY, MAY 11, 1900.

PLAINTIFFS brought action against defendants Jordan, R. A. Scott, assignee, and others, upon five promissory notes, each of which was declared upon in a separate count of the petition. Afterwards Davey and others, intervened, alleging they were the owners of the notes sued upon, subject to the claim of plaintiffs, who, it is averred, held such paper as collateral security only. Subsequently judgment was rendered in plaintiff's favor for the amount due on the notes, with an attorney's fee of one hundred and eighty-three dollars and forty cents, the latter amount being made up by computing the per cent. allowed by law upon each note separately. Thereafter a motion was filed by interveners to retax costs so far as attorney's fees were concerned, because the amount so allowed was excessive. The court held, on this motion, that in the computation of attorney's fees plaintiffs were entitled to the per cent. provided by law calculated upon each note separately, they having been given at different times, and being payable at different dates. The court also held the "return day," as the phrase is used in this statute, to be the second day of the term for which the action was brought. The judgment was rendered in August, 1897. Intervenors and the assignee appeal from the holding that the attorney's fees should be taxed sepa-

rately on each note, and plaintiffs appeal from that part of the order fixing the return day. Interveners and the assignee will be recognized as appellants.—*Affirmed*.

H. S. Winslow and W. O. McElroy for appellants.

Earle & Prouty for appellees.

WATERMAN, J.—The motion to retax costs was made at the term following that at which the judgment was rendered, but notice of it was not given plaintiffs until July, 1898. Appellees insist that the motion was too late; that the costs which the court is authorized to retax on motion are only those which are provided for in section 3862, Code, and which are to be assessed in the first instance by the clerk. If it be true that only the costs referred to in this section can be retaxed on motion, it does not follow that appellees are right in the position taken, for the section after mentioning certain items which the clerk is to tax, concludes as follows: "And any further sum for any other matter which the court may have awarded as costs in
1 the progress of the action, or may allow." This would include an attorney's fee which had been fixed by the court, for the clerk taxes these as well as other costs, although the amount is determined by the court. In an action on a written contract the court may fix the attorney's fees without taking evidence. *Cook v. Gilchrest*, 82 Iowa, 277. In such case no element of judgment or discretion is involved. The matter of fixing the fee is as purely formal as the act of the clerk in computing the number of words in a pleading in order to tax a copy fee. There does not appear any good reason, in a proceeding of this kind, for distinguishing between attorney's fees and other taxable costs. The motion to retax was proper. The delay in serving notice of the motion should not prejudice appellants' rights, for the trial court found that plaintiffs' coun-

sel had previous knowledge of the filing of the motion, and agreed to take it up without requiring service of notice.

II. We come next to consider the manner in which the attorney's fee should be computed. Our statute (section 3869) provides that in an action on a written contract providing for attorney's fees the amount allowed shall be ten per cent. on the first two hundred or fractional part thereof, five per cent. on the next three hundred dollars, three per cent. on the excess of five hundred dollars up to one thousand dollars, and one per cent. on all over

2 the latter amount. The question we have to deter-

mine is whether the computation should have been made on the total amount claimed, taken in bulk, or whether it was proper to consider each note separately, and allow the per cent. upon the different amounts due thereon. It is manifest that this latter method, which was pursued by the trial court, materially increased the attorney's fees. Whatever the rule might be, if these notes were a series given at the same time, and constituting together but a single transaction, we think it clear that where the notes, as in this case, are given at different times, each constitutes a separate, written contract, and the statute provides for the allowance of the fee at the rate specified when "judgment is recovered upon a written contract." This, we think, means that each written contract is to be considered by itself, and the computation made upon it separately. It is true all of these notes might have been united in a single count of the petition. *Stadler v. Parmelee*, 10 Iowa, 23; *Merritt v. Nihart*, 11 Iowa, 57; *Ragan v. Day*, 46 Iowa, 239. This, however, is a mere rule of pleading, and in nowise destroys the separate identity of each note. An action might have been brought upon each note. Had this been done, it seems manifest the attorney's fee would have been computed upon each of them. We discern no reason for saying that the form of the action or manner of suing should affect

the amount to be allowed. The trial court correctly computed the fee.

III. The section relating to attorney's fees, to which we have made reference, provides that on money paid after suit brought and before return day one-half the per cent. mentioned above shall be allowed, and on payments made after return day three-fourths of such per cent. Certain payments were made in this case after suit was brought, and it becomes necessary to determine whether they were made before or after return day. The trial court held the second day of the term for which the suit was brought to

be the return day, and made its computation on
3 that theory. Plaintiffs contend that, as the original notice must be served ten days before the first day of the term, the last day of service should be deemed the return day, and cite *Wilkins v. Troutner*, 66 Iowa, 557, in their support. Some language used in the opinion in that case sustains the claim made, but it was wholly unnecessary to a decision of the issues involved, which related only to the time when the affidavit, which is the basis for attorney's fees, should be filed. "Return day" is the day appointed by law when writs are to be returned and filed. Bouvier, Law Dictionary. While our statute provides for the return of original notices, no time is fixed for so doing. To say they are to be returned on the last day of service, might, in some instances, require an impossibility. There is no apparent necessity for their return before the time when the court may be called upon to take some action in the case, and this would be the second day of the term, or default day, which must be regarded as "return day" within the meaning of this statute. For the reasons given, it is obvious that on both appeals the judgment of the district court must be
AFFIRMED.

MATTIE STEWART V. D. B. ANDERSON, Appellant.

Breach of Promise: EVIDENCE. In an action for the breach of a marriage promise, proof of three engagements and the bearing of two children to defendant is sufficient evidence of plaintiff's
6 affections to warrant an instruction that if plaintiff's affections were implicated, and she had become attached to defendant, the wound and injury to affections should be compensated for.

Evidence: ADMISSIBILITY. Where there is a question as to whether a child was born in April or June, testimony that the weather was warm and pleasant at the time witness saw such new-
2 born child is admissible to show that she saw the child in June, rather than in April.

CORROBORATIVE OR COLLATERAL MATTER. Corroborative evidence of a
3 purely collateral matter, not in dispute, is properly excluded.

ANSWER TO REBUTTAL. Where the character of evidence sought to be introduced after the introduction of the rebuttal does not appear, it is properly excluded as not in response to the rebuttal
4 evidence, since it is the duty of the party to advise the court if the evidence was to be other than defensive.

AGE OF INFANT: *Expert testimony.* Whether a baby seen by a witness on a particular occasion was a newborn baby, or one that had been born some time, is a proper subject of expert testimony, since it is very difficult, if not impossible, to so describe a child of tender age as to enable the jury to judge for themselves.

Pleading: SETTING OUT EVIDENCE. An amendment to an answer
5 which pleads evidence is properly stricken.

Remarks of Judge on Credibility: NON-PREJUDICIAL. In an action for breach of marriage promise, a juror, on return to the jury into court to ascertain a certain fact, inquired whether defendant's statement concerning intercourse with plaintiff before she went
7 to a certain place should be construed as affecting other portions of his testimony. One of his attorneys remarked "that it could not affect his credibility," to which the court, in an undertone responded, "It might," and then instructed them that they were the judges of the credibility of the witnesses.

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Held, that no prejudice could have resulted from the remark of the court, as he gave no opinion as to whether the circumstance affected defendant's credibility.

Appeal from Audubon District Court.—HON. WALTER I. SMITH, Judge.

FRIDAY, MAY 11, 1900.

THE defendant appeals from judgment rendered on a verdict against him.—*Affirmed.*

Nash, Phelps & Mosier, J. M. Graham and Delano & Meredith for appellant.

Fred H. Blume and John M. Grigge for appellee.

LADD, J.—This action is based on an alleged breach of promise to marry, said to have been made December 2, 1895, and cemented by sexual intercourse two days later, resulting in the birth of a child August 26, 1896. Prior to all this however, in the springtime of 1893, there had been an indefinite arrangement to marry in the fall. Plaintiff was then a girl of sixteen years, and the defendant thirty years. According to her story, they had become unduly intimate August or the forepart of September of that year, or she had gone to Mills county to remain until a child was born. He fixed October 1st as the date of their proper relations, and declared he was not to marry unless the child came after July 1, 1895. The time of the baby's birth is in dispute; she insisting it was born August 26, and he that this occurred April 13th. She returned to her home in January, 1895, and thereafter no communication was had concerning matrimony, nor were their relations resumed prior to the date first mentioned. Evidence bearing on the main issue (i. e. whether they were engaged to marry December 2, 1895) is in conflict, and the jury's verdict is final.

I. The parentage of the first child necessarily had an important bearing on the outcome of the trial. The jury might have concluded that if born June 3d it was defendant's, and not his if born April 13th. Mrs. Salmonds was permitted to testify, from seeing the baby on a particular occasion, with reference to its being a newborn baby, or one that had been born some time, and also to particularly describe it. She thought it must have been a newborn baby. Undoubtedly she was competent to speak on the subject, as four children had been borne by her. The appellant insists, however, that this was not a subject of expert testimony. But it would have been very difficult, if not impossible, to so describe a child of such tender age as to enable the jury to judge whether at the time it was a few days or a few weeks old. The rule which governs in such a case was thus stated in *Yahn v. City of Ottumwa*, 60 Iowa, 429: "When the matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time," a conclusion may be given. *Bizer v. Bizer*, 110 Iowa, 247; 1 Greenleaf Evidence, section 440, and note. It was so held in *Benson v. McFadden*, 50 Ind. 431, where a witness was permitted to give his opinion of the age of another when a contract was signed. In *State v. Smith*, 61 N. C. 302, medical experts were allowed to give their opinion that the injured girl was under ten years of age. Testimony that the weather was warm and pleasant at the time was also admissible, as tending to show she saw the child in June, rather than in April.

II. A part of John Salmond's deposition was excluded. He had testified to hearing of the child's birth in April, and, on cross-examination, that Otis had so informed him, and that Watson had come to his place about the middle of that month. Otis had previously sworn the conversation with Salmonds was on the afternoon of the day the

child was born, and that Watson came up while they were talking. The latter had testified to having quit work for McClain on that day, which he fixed as April 13th; and McClain, as the middle of the month. The questions and answers excluded, in so far as material to our inquiry, may be set out: "Q. Do you remember of any other circumstance happening on the same day that you first learned of the birth of this child of Mattie Stewart's? And, if so, relate. A. When Otis told me about it, it was in the afternoon. I recollect where he told me about it. He told me that his wife helped to catch the kid. He and I were at the barn, and I recollect of seeing a young fellow coming past Wilkin's house when he was telling me about it. Q. Who was this young man you refer to? A. Elmer Watson. Q. For whom did he work, and when did he quit work for said person, with reference to the time Otis related to you the circumstance of the birth of this child? A. Elmer or E. P. McClain. It was the same day." Undoubtedly a witness may state that he had a conversation with another, on the subject inquired about, at a specified time, or may mention some collateral circumstances, as a reason for recollecting the fact spoken of. Thompson, Trials, section 373; Gillett, Indirect and Collateral Evidence, section 213; *Blackwell v. Hamilton*, 47 Ala. 472; *Angell v. Rosebury*, 12 Mich. 241; *Railway Co. v. Van Steinburg*, 17 Mich. 99; *O'Hagan v. Dillon*, 76 N. Y. 170. It is a matter of human experience that memory of dates and events depends largely on others associated more or less closely with them, and for this reason a witness is allowed to speak of contemporaneous circumstances, not in detail, but of their existence, as confirming his recollection. That Salmonds and Otis had the talk is not disputed. The important inquiry was directed to the time of its occurrence. The answer to the first inquiry had no bearing on that subject. The second and third answers tended to corroborate Watson's testimony

that he quit work that day, which was not disputed, but in no manner to confirm the witness' recollection of the time. The rule ought not to be extended, save under peculiar circumstances, so as to permit the litigant to introduce evidence in corroboration of a purely collateral matter stated by another in aid of recollection. Possibly cases may arise where the main issue is so necessarily connected with the collateral fact as that such evidence ought to be received. See *Inhabitants of Northbrookfield v. Inhabitants of Warren*, 82 Mass. 173. How far such an investigation should be carried is ordinarily within the sound discretion of the court, and it may be safely said not to have been abused in prohibiting all corroboration of a purely collateral matter not in dispute.

III. One of the defenses interposed was that plaintiff was engaged to George Downing and unduly intimate with him at the time of, and for some months after, the alleged engagement with defendant. Downing testified to having made arrangements with one Davis for a house to live in, and to which the plaintiff had assented. Davis was asked whether Downing had arranged with him to rent a house. For the reasons above stated, there was no error in excluding this evidence.

IV. After the rebuttal evidence had been introduced, one Bell, who had been in Minnesota with defendant in 1893, was asked whether he corresponded with plaintiff during that time, and also whether he met her after her return from Mills county, with a view of showing a subsequent conversation. The evidence was excluded, as not in response to the rebuttal evidence already introduced. The court had warned counsel that the witness must be present and called by the time a belated witness on the other side arrived. Nothing in the question indicated the character of the evidence to be elicited, and, as the ground of the court's ruling clearly appeared, it was

the defendant's duty to advise the court of the fact, if the answers to be given were other than defensive in matter.

V. Defendant was asked his recollection of obtaining information of the birth of the child in 1894, shortly after receiving a letter from plaintiff's sister. As he afterwards declared he acquired knowledge of the event
5 through this letter, the alleged error in not permitting an answer demands no attention. The parts of the amendment to the answer were rightly stricken, as they pleaded evidence. The ultimate facts, to sustain which evidence was admitted, remained.

VI. The court instructed the jury that if plaintiff's "affections were in fact implicated, and she had become attached to the defendant, the wound and injury to her affections should be compensated for." The appellant insists there was no evidence upon which to base such
6 an instruction. We are of opinion that proof of three engagements to marry, and the bearing of two children to him, is quite enough to warrant the inference of some feeling on the part of plaintiff.

VII. The jurors, at their request, were brought into court to ascertain whether the defendant had testified to having sexual intercourse with plaintiff after her return from Mills county. Being informed he had not, a juror inquired whether his statement concerning having intercourse before she went there should be construed as
7 affecting other portions of his testimony. One of his attorneys remarked "that it could not affect his credit to which the court, in an undertone, responded might." This was not addressed to the jurors, though them may have heard it. The court thereupon called attention to that part of the sixth instruction reading, "be the judges of the credibility of the witnesses," and directed them back to their room for further deliberation. No prejudice could have resulted from this remark. The court. He gave no opinion as to whether the circum-

stance did affect the credibility of the witness. Whether it did, was left to the jury. That it might have done so is not open to controversy. Every part of his testimony had a bearing on every other portion of it, and, where a witness admits of having been unduly intimate with a woman during a certain period, that fact will ordinarily have some bearing on his credibility in denying a similar relation at a subsequent time. We discover no error in the record, and the judgment is **AFFIRMED**.

MORRIS & LEWIS, Appellants, v. RACHEL POSNER, CITIZENS NATIONAL BANK, SOL CHAPMAN, JULIUS FREIBURG, O. H. DAVIDSON, S. B. GOLDBERG, JOSEPH HYMAN, H. A. POSNER, HENRIETTA PREDIMUS AND R. LEFLER.

111	335
120	508
111	335
137	305

Fraudulent Representations: RESCISION OF SALE. Where the buyer of goods, in making a statement of his assets and liabilities, falsely stated the amount of his liabilities to be less than they actually were, knowing that the seller had requested such statement as a basis for determining as to his credit, the seller, if he relied on the statement, on discovering such falsity, may rescind the sale, and recover the goods, though the buyer intended to pay for the goods, and did not intend to defraud the seller thereof.

REPRESENTATION BY AGENT. The husband who managed a business belonging to his wife, and who bought and sold goods and purchased goods on her credit, has implied authority to make representations as to her financial condition.

AUTHORITY TO WRITE LETTER: *Effect on principal.* Where a person procures another to write a letter for him, he is presumed to know the contents, and is bound thereby, whether he did or not, when the one to whom it was sent has acted on it.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

FRIDAY, MAY 11, 1900.

ACTION of replevin to recover goods sold under false representation of the purchaser. There was a trial to the court, and judgment for the defendants. Plaintiffs appeal. —*Reversed.*

F. S. Dunshee for appellants.

Read & Read for appellees.

SHERWIN, J.—The plaintiffs are merchants in the city of Philadelphia. During the year 1897, the defendant Rachel Posner was engaged in the merchant tailoring business in Des Moines, Iowa, her business being managed by her husband, Jacob Posner, since deceased. During the summer of that year the plaintiff's traveling salesman took an order from the defendant Rachel Posner, through her husband, for about one thousand dollars worth of goods, for delivery in the fall. This order was sent to the plaintiffs, and they, on the twenty-eighth of July, wrote Mrs. Posner for a statement of her assets and liabilities, writing, in substance, that they required such statement before shipping the order. This request was complied with in the following letter: "Des Moines, Iowa, Aug. 2, 1897. Morris & Lewis, Philadelphia—Dear Sirs: Your favor of the 28th to hand, and we accept your right to demand a statement, which I herewith submit: Stock and bills receivable, including good book accounts, etc., \$12,000; real estate, including home, \$18,000, \$30,000. Liabilities: Owe bank, \$1,500; mortgages, \$2,500; Eastern accounts due or settled by notes, \$1,000; Eastern accounts not due, and other liabilities, \$3,000,—total, \$8,000. Yours, respectfully, Rachel Posner." This statement was not satisfactory to the plaintiffs, and they wrote Mrs. Posner under date of August 5th, asking some explanations, and for a list of her eastern creditors, and the amount due each. Upon receipt of this letter she telegraphed plaintiffs, requesting

that the order given them be canceled. They then wrote her August 9th, stating that they thought she was not treating them fairly, and that they were entitled to the information asked, as they were exercising greater caution than formerly in extending credit, and calling her attention to the fact that she was already owing them an overdue account, which they had extended, and taken notes for. Mrs. Posner answered this letter August 24th, making the explanation asked in plaintiff's letter of August 5th, withdrawing the cancellation of the order, reducing it somewhat, and requesting shipment thereof. In answer to this letter the plaintiffs again asked for a list of eastern creditors and the amount due them, which was sent, and the goods were in due time shipped. The husband and manager of the business, Jacob Posner, died before shipment was made. November 17, 1897, chattel mortgages were given on the entire stock, including what was left of the goods shipped by plaintiffs in September. November 19, 1897, this action was begun to recover possession of the goods so shipped, on the ground that they were obtained by fraud and false pretenses. It is conceded by the defendants that, at the time the property statement was made to the plaintiffs, Rachel Posner owed a much larger sum of money than therein stated. It is conceded by the plaintiffs "that Mr. Jacob Posner, as manager of the business," at that time "expected to be able to continue the business indefinitely, and, if he had not died, probably would have been able to continue the business, meeting his obligations, for some years." The record before us conclusively shows that the goods would not have been sent to Mrs. Posner but for the financial showing made by her husband, as her agent, in response to the plaintiffs' request therefor; and the controlling question is whether the false statement as to such financial condition, unaccompanied by an intent to defraud the plaintiffs out of their property, is sufficient to entitle the plaintiffs to rescind the sale, and recover back their

goods. When the plaintiffs were insisting upon detailed information as to the assets and liabilities of Mrs. Posner, her manager knew beyond question the purpose of such request. He knew that it was information which was to determine whether credit should or should not be extended to her. He knew that the object of the plaintiff's inquiry was to ascertain the financial condition of Mrs. Posner, and her ability to pay her debts. No other conclusion could be drawn from the persistent repetition of the request. He knew that the statements sent to the plaintiffs did not show her actual indebtedness within five or six thousand dollars, and the conclusion is irresistible that the false statement made as to her liabilities was made for the purpose of obtaining credit from these plaintiffs. The law itself presumes that he intended his statement to be relied upon, and it was relied upon, and Mrs. Posner was notified by letter before the goods were shipped that the order would be filled on the strength thereof. What additional element is necessary to authorize a rescission of this sale on the ground of fraud? The defendants contend that, because an intent to cheat is not proven, no rescission of the sale can be made. It has been held by this court that "where the supposed solvency of the debtor is a material inducement to the sale of goods, and the purchaser makes false and fraudulent representations in regard to it, * * * which are relied upon, the sale may be rescinded." *Reid v. Cowduroy*, 79 Iowa, 169. It may be questioned in this case whether Mrs. Posner was at the time insolvent. She had not declared herself so, nor had it been judicially determined that she was; but this, we think, is not controlling. Her business may have been on the verge of collapse for some time, and still she may have deemed herself solvent; while from the same state of facts the plaintiffs may have considered her practically insolvent. When asked to extend credit to her, they were entitled to know her exact financial condition for the purpose of determining for themselves this very question. Her

information to them was intentionally false, and by reason thereof they were induced to part with their property. Her act was, therefore, fraudulent, and the plaintiffs, upon discovery of the fraud, could rescind the sale. *Reid v. Cowduroy, supra*; *Hubbard v. Weare*, 79 Iowa, 678; *McKown v. Ferguson*, 47 Iowa, 636; *Field v. Morse*, 54 Neb. 789 (75 N. W. Rep. 58); *Newell v. Randall*, 32 Minn. 171 (19 N. W. Rep. 972); *Cain v. Dickenson*, 60. N. H. 371; *Judd v. Weber*, 55 Conn. 267 (11 Atl. Rep. 40). Jacob Posner,

2 as we have seen, was the manager of his wife's business. He bought and sold her goods. It is shown that a large part of the purchases were made on credit. He had implied, if not direct, authority to make necessary representations as to her financial condition. *Mechem Agency*, section 369; *Story Agency*, sections 60, 85. In addition to this, the record fairly shows that Mrs. Posner knew of the statement to plaintiffs long before the goods were shipped. It is also said that Mr. Posner caused the statement to be written for him by another. If true, the law presumes that he knew its contents, and he would be bound by it whether he did or not, if the plaintiffs, without fault, acted upon it. The district court erred as to the law ruling this case, and the case is therefore REVERSED.

BECK & SON, MARTIN P. BECK, AND MARTIN P. BECK, JR.,
v. F. H. JUCKETT, Appellant.

Fraudulent Default Judgment: SETTING ASIDE. Plaintiff, being indebted to defendant, gave him an order on a club, which the club accepted, but failed to pay. Suit was brought on the order against plaintiff and the club and, on the return day, defendant's attorney assured plaintiff that defendant was not
1 seeking to hold him liable, that he need not appear, and that the suit would not be called until two days later, and the next day telephoned him that it would not be taken up the following day. About a month thereafter defendant procured a judg-

ment against plaintiff, by default, which he made no attempt to enforce until two years thereafter. *Held*, that such judgment had been procured by deception, and would be set aside, though plaintiff's application therefor, in which he pleaded a good defense to the action, was not filed within a year after the judgment was entered.

NEW TRIAL SHOULD RESULT. Where a default judgment was set 2 aside, as procured by deception, the court should have ordered a new trial as part of its decree.

Appeal from Cedar Rapids Superior Court.—HON. T. M. GIBERSON, Judge.

SATURDAY, MAY 12, 1900.

THE plaintiffs, being indebted to the defendant, gave him an order on the Cedar Rapids Commercial Club, which accepted it, and paid thereon all save a balance of one hundred and sixty-two dollars and twenty-five cents. Suit was begun against said club and plaintiffs at the April term, 1896, and judgment entered for this amount May 6th of the same year. This is an action in equity, commenced March 24, 1898, to set aside such judgment because obtained through fraud. Decree as prayed, and defendant appeals.—*Modified.*

Heins & Heins for appellant.

Rickel & Crocker for appellees.

LADD, J.—The defendant's attorney had assured Beck & Son before the action was begun that they could not be held on the Juckett claim. When M. Beck appeared in court on the second day of the term, he was lulled 1 into security by the declaration from the same source that: "We are not after you. We are after the Commercial Club,"—and was advised that "he need not come up or appear," and that the suit would not be called till two days later. The next day the plaintiffs were tele-

phoned that the cause would not be taken up the day following. No further attention was given the matter by the plaintiffs, and the attorney procured judgment about a month afterwards. The testimony of Beck is somewhat corroborated by other evidence, and, as the witnesses were before the trial court, we are not inclined to interfere with the finding that it should be accepted, rather than the statement of the attorney. Fraud is predicated, not on the fixing of the day for the hearing, as seems to be thought by appellant, but on the deception practiced, by which plaintiffs were misled into the belief that a remedy was being sought solely against the Commercial Club, and that there was no occasion for further attention in order to protect themselves. No judgment so procured should stand. Having the assurance that it would be unnecessary to appear again, and that the purpose was to enforce the claim against another, plaintiffs had no reason to suspect a judgment would be rendered against them, and were not put on inquiry until its payment was demanded, for the first time, nearly two years afterwards. Under these circumstances, equity should grant relief, though more than a year has elapsed since judgment was entered. A good defense is pleaded, and there is reasonable ground to think a different result will be reached on trial.

II. The decree "set aside, canceled, and held for naught the judgment." It should have directed a new trial. In *Lumpkin v. Snook*, 63 Iowa, 515, and *McConkey v.*

Lamb, 71 Iowa 638, this court declared the remedy
2 in such cases to be statutory. The aggrieved party having been deprived of an opportunity to defend, the remedy, available is its restoration, under the provisions of the Code. See title 20, chapter 1. To this extent the decree will be modified, with costs taxed to appellant.—
MODIFIED and AFFIRMED.

WILLIAM WINTER, Appellant, v. THE IOWA CENTRAL RAIL-
WAY COMPANY.

Railroad Mortgage: JUDGMENT LIEN: *Priorities.* Code 1873, section 1309, made a judgment against a railroad company for injuries, a lien on the property of the corporation situated in the county where the judgment was obtained, superior to mortgages or trust deeds executed since July 4, 1862. Plaintiff obtained a
1 judgment against a railroad company before a decree foreclosing a mortgage on its property, given since such date, was rendered. The judgment was afterwards reversed, and a new trial had, but the property was sold before the recovery of a second judgment. *Held*, that the judgment was not a lien on such property.

SAME. Where a decree foreclosing a mortgage on railroad real estate provides that it shall not affect liens or equities on the property prior to the mortgage foreclosed, but that the property be sold, and the proceeds applied to the payment of such preferred claims, the proceeds take the place of the property, and the latter cannot be subjected to the payment of a judgment for injuries subsequently rendered in an action then pending, which, under Code 1873, section 1309, would have been a lien superior to the mortgage, if rendered before the decree of foreclosure.

Appeal from Cerro Gordo District Court.—HON. J. F. CLYDE, Judge.

SATURDAY, MAY 12, 1900.

PLAINTIFF, a judgment creditor of the Central Iowa Railway Company, brings this action for decree declaring said judgment to be a lien as against the defendant upon the track, right of way, depot grounds, buildings, and appurtenances of said railway in the county of Cerro Gordo. The issues will appear in the opinion. Judgment was rendered dismissing plaintiff's petition, and he appeals.—*Affirmed.*

H. C. Hemenway and J. J. Clark for appellant.

Blythe, Markley & Smith for appellee.

GIVEN, J.—I. The Central Iowa Railway Company formerly owned and operated the railway of which the property in question was and is a part. On the third day of March, 1885, this plaintiff commenced an action in the district court of Cerro Gordo county against that company to recover damages for personal injuries, and on a second trial on the fourth day of February, 1899, he recovered judgment for two thousand dollars, which remains unsatisfied. On the fifteenth day of July, 1879, said company executed its mortgage upon its railway, including the property in question, which mortgage was foreclosed by decree rendered in the circuit court of the United States, Southern district of Iowa, May 24, 1887, in an action commenced December 1, 1886, to which this plaintiff was not a party. On the seventeenth day of September, 1888, said entire railway property was sold under said decree to James Thompson on behalf of the holders of the mortgage bonds, which sale was approved, and deed ordered. Mr. Thompson having assigned his bid to the Iowa Railway Company, a deed was made to that company May 5, 1879, and recorded December 19, 1888. On the first day of August, 1888, said Iowa Railway Company conveyed to the defendant, which deed was also recorded December 19, 1888, and the property has, ever since said conveyance, been owned and operated by the defendant company. The decree of foreclosure is quite lengthy, and need not be set out in full. It is sufficient that we notice those parts bearing upon the points to be considered.

II. Section 1309 of the Code of 1873 is as follows: "A judgment against any railway corporation for any in-

jury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, A. D. 1862.” This court has held that a right of action, or an action pending, is not a lien under said section; that it is judgments alone that may become liens thereunder. *Railroad Co. v. Verry*, 48 Iowa, 458; *Brockert v. Railway Co.*, 93 Iowa, 132. It will be observed that said mortgage was foreclosed, and the property sold and conveyed, prior to the time plaintiff obtained his judgment. True, on the first trial in February, 1887, which was before the decree and sale, plaintiff recovered a judgment, but it was reversed, and a new trial granted. Therefore it is as if no such judgment had been rendered. Counsel for plaintiff concede that, if the decree sale and conveyance were “an unqualified sale and change of title and ownership,” plaintiff is not entitled to a lien, but they rely upon certain provisions in the decree as showing that an unqualified sale was not ordered and made, and that the rights of the creditors of the Central Iowa Railway Company were reserved to them in the property. They do not claim that the doctrine of *lis pendens* applies, but insist that the pendency of their action for damages, and the fact that a judgment therein would become a lien under the statute, shows that the claim now made is not inequitable. We are clearly of the opinion that the plaintiff had no lien at the time of the decree, sale, and conveyance, and that he is not now entitled to a lien, unless that right is reserved to him in the decree.

III. The decree of foreclosure is not set out in full, but sufficient of it for the purpose of the question to be considered. The mortgage was upon the entire property, and was foreclosed as to “all property, rights, or interests conveyed thereby,” and the property rights and interest conveyed ordered sold as an entirety, without appraisement or

redemption, and it was thus sold. The decree contains the following: "And it is further adjudged and decreed that the purchaser or purchasers of the property herein decreed to be sold shall be invested with and shall hold, possess, and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges, and franchises appertaining thereto as fully and completely as the said Central Iowa Railway Company, defendant herein, now holds and enjoys, or has heretofore held and enjoyed, the same; and, further, that the said purchaser or purchasers shall have and be entitled to hold said railroad and property free and discharged of and from the lien of the said main line mortgage hereinbefore mentioned, and from the liens of the consolidated mortgage dated June 1, 1884, and from the claims of the parties to this suit, and of all persons in any manner represented by any party to this suit, sub-

ject, however, to the reservation hereinafter made
2 and contained. * * * And it is further pro-

vided that this decree shall not affect the rights of any parties not herein expressly adjudicated, claiming right or equity in and to the property embraced herein prior to those of the first mortgage bondholders; nor shall any such decree affect the rights of any party or parties claiming liens by judgment, statute, or otherwise, or claiming equities or rights in or to said property, or any part thereof, or claiming the right, either at law or in equity, to subject said property, or any part thereof, to payment of their claim or demand, but the right is expressly reserved to allow such parties to hereafter intervene herein for the protection and enforcement of their rights and equities, including all parties in whose favor causes of action may arise against the receiver of said property up to the time the said receiver may be finally discharged; and for the purpose of hearing and determining all such matters and enforcing satisfaction of all orders and decrees thereon rendered the court expressly reserves full jurisdiction of this cause and the property

included in this decree." It was ordered that the proceeds of the sale be applied to certain purposes, including the following: "*Third.* The payment of such claims, if any, as the court may decide to be prior in equity to the said outstanding main line bonds and coupons." The sale and conveyance were made in conformity with the decree, and, as we understand it, vested the purchaser with all the title and interest of the Central Iowa Railway Company, free of incumbrances, and reserved to those having legal or equitable liens to come into that court, and assert their rights to share in the proceeds of the sale. The decree is only thus qualified, and, the proceeds taking the place of the property, the sale and conveyance were without qualification. The reservations in the decree are as to those having legal or equitable liens or claims against the receiver. The plaintiff had no legal lien, and, as his right to a lien is purely statutory, he could not have an equitable lien, and is not, therefore, within the reservation provided in the decree. When this decree was rendered, and sale and conveyance made, the plaintiff was in the same position as any other creditor of the Central Iowa Railway Company whose claims, when reduced to judgment, would become liens upon what that company might then own.

Question is made that the plaintiff should have gone into the federal court to seek relief. As we are of the opinion that he is not entitled to the relief prayed, we do not order this question. The decree of the district court is
REMED.

SHERWIN, J., took no part.

OLE OLSON, Appellant, v. THE HANFORD PRODUCE COMPANY.

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124	51
124	475
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Negligence of Master: JURY QUESTION. The owner of a building maintained a platform elevator in its building. Two sides were uninclosed, and between two of the floors an iron girder
 1 extended into the elevator shaft in close propinquity to the elevator platform, when it was on a level with the girder. The
 2 elevator shaft was dark, so that the protruding girder could not be readily seen, and plaintiff, in the course of his employment, while taking a truck load of goods up on the elevator, came in contact with the iron girder and was injured. Defendant did not warn plaintiff of the existence of the girder, or of the danger therefrom. *Held*, that the question whether or not defendant was guilty of negligence was one for the jury.

CONTRIBUTORY NEGLIGENCE: *Jury question.* Plaintiff while employed by defendant, and while engaged in his duties under such employment in taking merchandise from one floor of defendant's building to another on an open platform elevator, stood on such elevator so that his heel and foot extended over the side of the platform, and was injured by coming into contact with an iron girder which extended from a wall near the elevator
 4 to a point in close propinquity to the platform when it passed such girder. Plaintiff did not know of the presence of the girder, and the elevator shaft was dark, so that the presence of such girder could not be readily ascertained, and defendant had never warned plaintiff of its presence, and of the danger therefrom. At the time of the accident, plaintiff's mind was distracted by the necessity of attending to the big truck load of merchandise he had on the elevator, to prevent its falling off. *Held*, that it could not be said as a matter of law that plaintiff was guilty of contributory negligence, but such question should have been submitted to the jury.

ASSUMING RISK OF EMPLOYMENT: *Jury question.* Since plaintiff had the right to assume that defendant would furnish him a safe
 3 place in which to work, and would inform him of any danger, it cannot be said as a matter of law that plaintiff assumed the risk as incident to his employment.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

SATURDAY, MAY 12, 1900.

ACTION at law to recover damages for injuries sustained by plaintiff in operating a freight elevator in a building belonging to defendant. The trial court sustained a demurrer to the petition, and plaintiff appeals.—*Reversed*.

Jepson & Jepson and *Argo & Middlekauff* for appellant.

Wright, Call & Hubbard for appellee.

DEEMER, J.—The material allegations of the petition are as follows: Defendant is engaged in the business of keeping and operating a large cold-storage warehouse in the city of Sioux City, and in the building operates a
1 freight elevator, for the purpose of conveying goods from one room to another. The elevator is called a “platform elevator,” and plaintiff charges that at the time of the accident it was unsafe and dangerous by reason of the north and south sides of the shaft being uninclosed and unprotected; that there was no light near to the elevator, and that by reason of its location it was so dark in and about the appliance that it could not be used with safety; that it was located south of a partition wall running east and west through the building, and that between the first and second floors of said partition wall there was a heavy sill or girder projecting out several inches from the wall, and that there was nothing on the north side of the elevator to prevent persons operating the same from coming in contact with the aforesaid girder or sill; that plaintiff, while in the employ of defendant, and under its orders and directions, attempted to use the elevator to convey from one floor to another a truck on which was closely and heavily packed a large amount of freight consisting of merchandise and boxes, and while moving the said elevator from the lower to

the upper floor, and being busied in keeping the freight from slipping off the truck, and not knowing or being informed of the dangerous condition of the elevator, or knowing of aforesaid sill or girder, and it being dark and unlighted in and about the elevator, plaintiff, without negligence or carelessness on his part, stepped on the platform with his foot and heel extending and projecting over and out from the edge of the platform of the elevator; and while the elevator was passing from the first floor upward his foot was caught between the platform and the sill or girder, causing the injuries of which he complains. The negligence complained of is defendant's failure to guard or protect the elevator, the projecting sill or girder, the want of sufficient light, and defendant's failure to warn him of the danger. The demurrer is on the grounds: *First*, that the petition fails to show negligence; *second*, that plaintiff assumed the risk; *third*, contributory negligence on the part of plaintiff. As a general rule negligence is a question for the jury. When the facts are not in dispute, however, the question may, in some cases, be of law; but where reasonable men may honestly differ as to the effect of conceded facts, or when a finding of negligence by a jury from conceded facts would not be without support, the question is one for the jury, and the court cannot say as a matter of law

2 there is no negligence. Applying these rules to the facts stated, and it seems to us the question of negligence in leaving the sill or girder projecting from the partition wall so near the elevator as is claimed, without a guard or protection, was peculiarly one for a jury. Had the jury found that the defendant was negligent in the construction of the elevator, then the question of assumption of risk was also a fact to be found by that tribunal authorized to make such findings. It was the defendant's duty to furnish plaintiff a reasonably safe place in which to work. It was also its duty to inform plaintiff of the dangers known to it, and that could not readily be seen by ordinary observation.

Now, the petition charges that plaintiff was not informed of the danger, and sets forth facts with reference to the absence of light from which it sufficiently appears that the

danger was not open to ordinary observation. Plain-

3 tiff had a right to assume that defendant would do

its duty, would furnish him with a safe place and ordinarily safe appliances, and that it would inform him of any latent hidden dangers, and he was not obliged to hunt for possible dangers. If the allegations of the petition are true, a jury would be warranted

in finding that plaintiff did not assume the risk.

4 Plaintiff's contributory negligence is a question of

more doubt, although the same rules apply to this as to the question of defendant's negligence. If reasonable men might fairly reach different conclusions on this issue, the question is one of fact for the jury, although the evidence is undisputed. Plaintiff was directed to do the very work he was doing, and ordinarily it would be sufficient to charge that the injury he received was without fault or negligence on his part. Here he has set forth the fact that his heel and foot extended over the platform of the elevator, and was caught between it and the sill or girder; that he did not know of the danger; and that at the time his mind was distracted by the goods that were loaded on the truck. Ordinarily, it is dangerous for one to permit his foot to extend over an elevator platform, and, had plaintiff been injured by the floor through which the elevator was required to pass, it is likely that his own negligence would be such that he could not recover. However, this might depend somewhat on the light, and somewhat on the construction of the elevator, and the purpose for which it was used. From the allegations of the petition it appears, however, that there was a partition wall that in itself offered no danger. If that wall had continued to the second floor without projection, as plaintiff says he thought it did, there would have been no danger to the protruding foot. Instead

of this being the condition of affairs, the defendant allowed a sill or girder to project from the wall, and so close to the elevator platform, when passing it, that a jury may have found it dangerous. Of this danger plaintiff says he had no notice or knowledge. Under this state of facts it seems to us that the question of contributory negligence was one of fact for the jury, and that a court should not say, as a matter of law, that plaintiff, by his own negligence, contributed to the injury. The facts in *Hoehmann v. Engraving Co.* (Com. Pl.), 23 N. Y. Supp. 787, are so dissimilar that the case cannot be considered an authority. There plaintiff was aware of his surroundings, and could see all parts of the elevator. He had no duty to perform about the elevator, and chose to ride on it rather than to walk to the next floor, where duty called. It was a freight elevator, and was not intended for passengers. Here plaintiff had no knowledge of the condition of affairs, and could not see for want of light. Plaintiff was also engaged in the performance of his duties, under the orders and directions of his employer. By reason of this fact a duty devolved upon the master not found in the New York case. We think the demurrer should have been overruled. As sustaining our conclusions, see *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa, 332; *Stomme v. Produce Co.*, 108 Iowa, 137; *Connors v. Morton*, 160 Mass. 333 (35 N. E. Rep. 860); *Hackett v. Manufacturing Co.*, 101 Mass. 101; *McGonigle v. Kane*, 20 Colo. Sup. 292 (38 Pac. Rep. 367).
—REVERSED.

L. MERCHANT, Assignee, Appellant v. M. O'ROURKE.

Statute of Frauds: A MERE RULE OF EVIDENCE. The statute of frauds does not prohibit an oral contract, nor make such agreement illegal because certain formalities are not complied with, but

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137	624

111	351
141	451

- 1 relates only to the method by which proof may be made in an attempt to enforce it.

AGREEMENT NOT WITHIN. An agreement is held not to be within the
4 statute of frauds, as being a promise to answer for the debt, default, or miscarriage of another.

Contracts: MUTUALITY AND CONSIDERATION. Where one is induced to purchase stock of a corporation by reason of an oral agreement of another to take the stock from him whenever he
2 should desire, and to pay him therefor what the same had cost, such agreement is not invalid for want of mutuality and consideration.

CONSIDERATION. Where one is induced to purchase stock of a corporation by reason of an oral agreement of another to take such stock from him whenever he should desire, and to pay him therefor what the same had cost, and, afterwards, on request of the purchaser that the stock be taken off his hands,
3 such other person orally agrees that if the purchaser will release him from his first agreement, and permit him to vote the stock by proxy, he will save the purchaser harmless from any liability on account of such investment, the release from the first agreement, though it be within the statute of frauds, and the right to vote the stock, are a sufficient consideration to support the second.

Appeal from Kossuth District Court.—HON. LOT THOMAS, Judge.

SATURDAY, MAY 12, 1900.

PLAINTIFF is an assignee for the benefit of creditors under a deed of general assignment executed by one L. Carmichael, and his cause of action grows out of the following facts: The Tama Furniture Company, whose business is indicated by its name, was organized with a capital of \$10,000, divided into shares of \$100 each. Carmichael was a stockholder, and defendant, also,—the latter being the owner of 10 shares. In several respects the requirements of the statute were not complied with, in effecting the incorporation of the company. The company became indebted for a large amount, which it was unable to pay. Some of these debts were put in judgment against Carmichael, and

claims for all were filed with and paid by plaintiff, as his assignee. This action is brought to recover from defendant his proportionate share of the amounts so paid. The answer, so far as material here, is to the effect that Carmichael induced defendant to purchase the stock in question by orally agreeing to take the same off defendant's hands at any time he so desired. It is alleged that, some time after this, defendant desired Carmichael to take the stock from him as agreed, and presented it for that purpose, and, to induce defendant to retain the stock, Carmichael then agreed orally that if defendant would release him from his agreement to take the stock, and would retain the shares himself, and permit Carmichael to vote the same by proxy, he (Carmichael) would save defendant harmless from any liability growing out of, or in any way connected with, the ownership of said shares. Evidence was received tending to sustain this answer, but on motion of plaintiff it was stricken out, and a verdict directed for plaintiff. On this verdict a judgment was duly entered. Thereafter, on defendant's motion, the judgment and verdict were set aside and a new trial ordered. From this order plaintiff appeals. —*Affirmed.*

Struble & Stiger and Clark & Cohenour for appellant.

Carr & Parker and W. L. Joslyn for appellee.

WATERMAN, J.—The parties unite in presenting for determination but a single issue, and that is whether the answer set up a legal defense. It seems to be conceded that, if it does, there was no error in granting the new trial. While we interfere very reluctantly with an order of this kind made by the trial court, yet we have no hesitation in passing upon the correctness of the ruling where the exact ground on which it is based is shown. *Turley v. Griffin*, 106

Iowa, 161. There are two contracts set up in the answer, and we shall take them up in their order.

I. Was the agreement valid by which Carmichael undertook to take the shares from defendant whenever the latter desired, and pay him therefor what the same had cost? On the part of appellant it is insisted that the invalidity of this contract is settled by the decision of this court in *Kauffman v. Harstock*, 31 Iowa, 472. In that case plaintiff had subscribed for certain shares of stock upon defendant's promise to buy them for the price paid, on certain conditions. The action was brought to enforce this agreement, it being alleged that the conditions were all performed. It was conceded that parol proof of the agreement was not admissible unless it was found to be a present sale of the stock, and this court held that it was not such a sale, and therefore could not be established by parol. This is all that is decided in the cited case. We do not regard the question of the statute of frauds as material in considering this first contract. If it was a lawful agreement, it is of no concern how it might be proved, for there is no attempt made here to enforce it. It is set up only as a basis for the second agreement, which is relied upon as a defense. The statute
1 of frauds does not prohibit an oral contract, nor make such agreement illegal because certain formalities are not complied with. It relates only to the method by which proof may be made. *Townsend v. Hargraves*, 118 Mass. 334. We shall have more say on this subject further on. At present we devote our attention to the question of the validity of this first agreement, which seems to be denied for want of mutuality, and because it was without consideration. Option contracts are of frequent
2 occurrence in the business world. Benjamin Sales, section 39. Had defendant offered to sell his stock to plaintiff at a certain price, giving him a definite time within which to accept, an acceptance within the time would have constituted a binding contract. Benjamin Sales,

supra; *Pratt v. Prouty*, 104 Iowa, 419. If such an option given the purchaser is valid, we can see no reason why a seller's option would not be likewise legal. The acceptance of the offer to sell in the one case, and of the offer to purchase in the other, makes the contract mutual. As to the matter of consideration, it is elementary that a detriment to the promisee is sufficient, and this is found here in the purchase of this stock by defendant, against his desire, because of Carmichael's promise. The first contract was clearly legal.

II. The second agreement, which is set up as a defense, was to the effect that defendant released Carmichael from his obligation to purchase said stock, and gave him the right to vote it, and the latter agreed to pay any liability that might be incurred on account of such investment.

3 Let us suppose the first agreement was within the statute of frauds; it still might have been established by Carmichael's testimony. Code, section 4268. If Carmichael's oral admission could thus establish liability against him, we do not see why a recognition by him was not sufficient to give to this first contract vitality enough to make a release from its obligation operative as a consideration for the new agreement.

III. It is contended that the second contract was a promise to answer for the debt, default, or miscarriage of another, and therefore within the statute of frauds. Generally speaking, to bring a promise of this nature
4 within the statute, it must be made to the person entitled to enforce the liability assumed by the promisor. A promise to the debtor to pay his debt, and thereby relieve him from the payment of it himself, is not within the statute. 1 Beach Contracts, section 507 *et seq.* It is apparent that those entitled to enforce the liability assumed by Carmichael were the creditors of the corporation, and no promise was made to them. In *Beaman's Adm'rs v. Russell*, 20 Vt. 205, the rule is thus stated: "If a promise of in-

demnity be not collateral to the liability of some other person to the same party to whom the promise is made, it is not within the statute." That this is the general rule, see *Tighe v. Morrison*, 116 N. Y. 263 (22 N. E. Rep. 164); *Chapin v. Merrill*, 4 Wend. 657; *Alger v. Scoville*, 1 Gray, 391; *Goetz v. Foos*, 14 Minn. 265 (Gil. 196); *Nelson v. Bank*, 48 Ill. 36. We are not without authority on this point in our own state. In *Bartlett v. Insurance Co.*, 77 Iowa, 155, there was a contract on defendant's part with another company, in which plaintiff was insured, to reinsure its risks. It was claimed that this contract was within the statute, and could only be established by written evidence. In passing on the point this court said: "An agreement to reinsure is not an undertaking to answer for the debt or default of the first insurer, but is an original undertaking, entered into with him, to indemnify the owner of the property in case a loss occurs. It is in no sense a contract of guaranty or suretyship, but under it, as between the immediate parties, the reinsurer assumes the risk absolutely. He takes the place of the first insurer, assuming his liabilities, and is bound in any event to him or to the owner of the property, and the statute of frauds has no application to a contract of that nature." In the case at bar the contract was an original undertaking of Carmichael, made upon a consideration which moved directly to him. It was collateral to no promise of defendant, and, for the reason heretofore given, was not within the statute. That there was a sufficient consideration for this second contract seems clear, without argument. Carmichael obtained the right to vote this stock, and secured a release from the obligation of his first agreement. The district court did not err in granting a new trial.—AFFIRMED.

J. H. POWERS v. HERMAN KLATT, Appellant.

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Mulct Law: VIOLATION: *Single door.* Where liquors are sold at wholesale and retail in a single room in the same building, and the liquors sold at wholesale were delivered from a cellar, through an outside cellar door, instead of from the room above, where the retail business is carried on, and which is connected with the cellar by a door in the floor, leading to a flight of stairs running to the cellar, where all the liquors are stored, and but one tax on the business is paid, it constitutes a violation of the mulct law (Code, section 2448), providing that the selling or keeping for sale must be carried on in a single room, having but one entrance or exit, and that opening on a public business street.

111	357
144	386

Appeal from Chickasaw District Court.—HON. A. N. HOBSON, Judge.

MONDAY, MAY 14, 1900.

SUIT in equity to enjoin a liquor nuisance. From a decree for plaintiff, defendant appeals.—*Affirmed.*

Springer & Clary for appellant.

J. H. Powers in pro. per.

DEEMER, J.—The case was tried on a stipulation of facts reciting, in substance, that defendant was engaged in the wholesale and retail liquor business in the town of New Hampton, Iowa; that he had complied with the provisions of the mulct law, unless the following facts constitute a violation thereof, to-wit: The sales were all made in one room, that had no other than the front door, save one in the floor of the building, leading to a flight of stairs running to the cellar. Liquors for retail were brought through this door from the cellar to the main room for retail purposes. Liquors sold at wholesale were delivered from the cellar

through an outside cellar door. No business is carried on in the cellar, except the storing of the liquor, and no person is allowed therein, save the persons who deliver the goods. In other words, the cellar is used simply as a storeroom. Defendant has paid but one tax on the business in which he has been engaged. The controlling point in the case is, does the door

ad the delivery from the cellar through an r the defendant liable for the keeping of le (section 2448) provides, in substance, or keeping for sale of intoxicating thorized, must be carried on in a single one entrance or exit, and that opening siness street. It may be that the door to an entrance or exit. On that point we ex- out hold that the door, in connection with the r, was an exit or entrance to the room, and with the statute. *Ritchie v. Zalesky*, 98 n, in view of the outside entrance to the two rooms in which the business was con- that one was under the other, instead of of it, is not important. There were two ng an entrance and exit of its own, and ected by the cellar door. *State v. Bussa-* 1. The agreed facts leave little room for re satisfied, however, that defendant was th the law as it is written, and that the and it is, **AFFIRMED**.

pellant, v. THE MUTUAL FIRE INSURANCE
COMPANY OF DES MOINES.

USE SWEARING: *Directed verdict.* Where a fire i a provision that it should be void in case of by the insured on any matter relating to insur- was testimony that mis-statements in the proof

1 of loss were made through mistake, it was error to take the
case from the jury, as the policy was only void for willful
false swearing, with intent to defraud.

FORFEITURE: *Illegal saloon in building.* A policy on a building
2 and on property contained therein is not avoided by the fact
that a saloon therein is not run in strict compliance with law.

MISREPRESENTATION OF RISK: *Jury question.* Where the agent of
an insurance company was in the building insured when the
application was written, and the nature of the business therein
3 was talked over, and the policy recited that a tenant used the
building for a saloon, there was no misrepresentation as to its
occupancy which would warrant taking the case from the jury.

CONFLICTING EVIDENCE OF VALUE: *Jury question.* Where there was
conflicting evidence as to the value of certain personal prop-
4 erty destroyed, the question should have gone to the jury.

EVIDENCE: *Contradiction by declarations.* Where a witness for the
company claimed to own some of the property destroyed, for
6 which a claim for insurance was made by plaintiff, it was error
to refuse to admit previous declarations of such witness in re-
lation to the ownership of the property.

PLEA AND EVIDENCE. Where the legality of a business conducted on
the destroyed premises was not in issue, it was error to allow
5 a witness to testify that an unlawful business increased an
insurance risk.

Appeal: ~~OBJECTION~~ *BELOW.* Where the objection that an action was
prematurely brought was not raised in the trial court, a judg-
7 ment for defendant will not be affirmed for such reason, where
there was reversible error in the record.

*Appeal from Keokuk Superior Court.—HON. RICE H.
BELL, Judge.*

MONDAY, MAY 14, 1900.

ACTION at law on a fire insurance policy. A jury was
impaneled, and heard the evidence. On motion of the
defendant the case was then taken from the jury and dis-
missed. The plaintiff appeals.—*Reversed.*

A. L. Parsons and Nannie M. Smith for appellant.

Wm. C. Miller for appellee.

SHERWIN, J.—On the twenty-fifth day of August, 1897, the defendant issued its policy of insurance to the plaintiff, insuring him against loss by fire on a certain building, and on personal property contained therein. On the twenty-first day of September following, the building

and personal property were totally destroyed by fire,
1 which originated in an adjacent building. Defendant

pleaded that the plaintiff swore falsely in making his proofs of loss, and that plaintiff's tenant did not run his saloon in the insured building in compliance with law. At the close of the testimony the court took the case from the jury upon defendant's motion. This was error. One condition of the policy is that it shall be void "in case of false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss." The false swearing that will avoid a policy must be willfully false, and done with intent to defraud the company. *Huston v. Insurance Co.*, 100 Iowa, 402. There was testimony tending to show that whatever misstatement the plaintiff made regarding his loss was through mistake, and that the personal property actually destroyed was worth much more than the amount of insurance thereon. This question was for the jury, and

2 should have been submitted to it. The mere fact saloon keeper does not conduct his business in
ance with the law of the state does not avoid
insurance on the building in which such busi-
ness is conducted, nor a policy which covers personal prop-
Erb v. Insurance Co., 98 Iowa, 606; 99

ground of defendant's motion is that plain-
tiff presented the occupancy of the building. The
agents of defendant were present in the building
when the application was there written by
them. There is testimony that the nature of
business was talked over in detail with them.

They knew the general nature of it from observation. The policy itself says the building is occupied by a tenant, and used as a saloon. The court certainly could not have sustained the motion on this ground. *Key v. Insurance Co.*, 77 Iowa, 174; *Jamison v. Insurance Co.*, 85 Iowa, 229.

4 There was a conflict in the testimony as to the value of the personal property, and the question should have gone to the jury.

The president of the company was permitted to testify over the objection of the plaintiff, that an unlawful business increased an insurance risk. No issue of this kind
5 was before the court, and the admission of this testimony was error.

On the question of the ownership of some of the personal property insured, plaintiff sought to prove the previous declaration of one Scott, who claimed at the trial to
6 own some part of it. This evidence the court rejected, and we think there was error in this which must have been prejudicial to plaintiff. *Stephens v. Williams*, 46 Iowa, 540.

There are many other errors assigned on the admission or rejection of testimony, but we discover no other prejudicial error, and need not further notice them.

The appellee contends here, for the first time, that this action was prematurely brought, and there ought to be an affirmance for this reason, notwithstanding the fact that the question was not presented in the pleadings, nor raised
7 in the lower court. Under the well-settled rule, this contention cannot be sustained. *Garland v. Wholebau*, 20 Iowa, 271. For the errors noticed, the case is REVERSED.

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AMY CHEW v. SARAH E. HOLT *et al.*, Appellants.

Title: INSUFFICIENT EVIDENCE. In partition by the widow of C, the defendant, one of C's sons, claimed title under an oral contract with deceased, acquiesced in by the plaintiff, under which he undertook to care for and support them during life. The parents, defendant, and another son, had lived together on the premises for several years after the date when the alleged agreement was claimed to have been made, plaintiff doing the housework and the father and other son working on the place. Continuously during those years the other son shared the crop. The building and stock was insured in the name of all three, and the taxes were assessed in the name of the father and the receipts ran to him. Improvements were made, but there was no evidence that the money paid therefor did not come from the profits of the land, the manufacture of tobacco, and the care of bees by the father. Defendant had paid the administrator \$125, and plaintiff \$25, which they supposed to be rent, but which he afterward claimed to be a debt due, and other members of the family denied knowledge of the alleged contract. There was evidence that the father had stated to several that he had turned the place over to defendant, and other evidence that he stated the farm would be defendant's when he was through with it, and that he expected him to have it. *Held*, that the evidence was not sufficient to support defendant's claim.

Evidence: TRANSACTION WITH DECEDENT: *Timely objection.* Where the widow of decedent brought partition and a son claimed title by an oral agreement with deceased, objection to the son's testimony as to personal transactions with decedent need not be interposed to the administration of the oath, since there were matters relevant to the issue on which he was competent.

Testimony: CONSIDERED ON APPEAL. Where the widow of deceased brought partition, and a son claimed title by an oral agreement with deceased, his testimony as to transactions with deceased, received without objection, though incompetent under Code, section 4604, must be considered as part of the evidence, on appeal.

from Mahaska District Court.—HON. BEN MCCOY,
Judge.

MONDAY, MAY 14, 1900.

THE record title to the one hundred and twenty acres of land in controversy was in the name of Asa S. Chew at the time of his death, in 1891. The plaintiff is his widow, and the defendants his six children, five of whom join in the prayer for partition. The other, Edwin C. Chew, claims to be the unqualified owner of the premises by virtue of an oral contract with the deceased, acquiesced in by plaintiff, under which he undertook to care for and support them during their lifetime, and in return was to have said land "at the death of said parents." He alleged he was to handle and improve the farm as his own, which he did; compliance with his obligation, and readiness to comply in the future; and prayed that his title be confirmed, and, if not, that he be allowed for the improvements. In an amendment to the answer, he averred his parents left the farm in 1891, without reasonable cause; that under the contract title vested in him, subject only to the life estate of his father, and that it became absolute upon his death; that the obligation to support and care for the plaintiff is personal only. The reply was a general denial, together with the averment that the premises constituted the homestead of the parents, and plaintiff had not assented to the gift thereof, and asked that, if it be found to have been given to Edwin, the value of plaintiff's support since leaving the farm and during the remainder of her life be determined and made a lien on the land. The other children joined in a general denial. Decree was entered awarding Edwin C. Chew an undivided two-thirds interest in the land, and plaintiff one-third thereof, in lieu of past and future support, with a provision that each should pay a like portion of the costs, dividing attorney's fees equally between counsel for respective parties, and taxing one-half to each, and establishing said costs and fees as a lien against the land. The plaintiff appeals.—*Reversed.*

J. C. Williams and B. W. Preston for appellants.

G. W. Lafferty, J. F. and W. R. Lacey, and Bolton & Bolton for appellee.

LADD, J.—Caution should be exercised in scrutinizing the oral proofs of dealings between the aged and infirm and those having claims upon their affections. Nothing short of the complete control of the property they have accumulated can be tolerated, but, in guarding their rights, we ought not to forget that people so situated are prone to reach out for aid and relief from care in their declining years to those who, because of their relationship, may be expected to respond. And often conduct which might ordinarily confirm an alleged agreement, because of mutual obligations springing from the ties of blood, should be given no significance. *Shellhammer v. Ashbaugh*, 83 Pa. St. 24; Thornton Gifts, section 398. Though an oral contract to give land, even a homestead, in consideration for support, if partially executed, is binding (*Drake v. Painter*, 77 Iowa, 731, and *Winkleman v. Winkleman*, 79 Iowa, 319), it must be established “by clear, unequivocal, and definite testimony, and the acts done thereunder should be equally clear and definite, and referable exclusively to said contract and gift” (*Truman v. Truman*, 79 Iowa, 509, *Williamson v. Williamson*, 4 Iowa, 281; *Wilson v. Wilson*, 99 Iowa, 693).

II. It is only when a witness is rendered by the statute wholly incompetent to testify that objection must be interposed to the administration of the oath. *Watson v.*

Riskamire, 45 Iowa, 231; *Winters v. Winters*, 102
1 Iowa, 57. Edwin C. Chew was competent to speak

on many matters relevant to the issues, though prohibited from testifying to personal transactions with his deceased father. Code, section 4604. He could not with propriety be excluded as a witness, but might be prevented from speaking of such transactions. His testimony concerning

the dealings with the deceased, however, received without objections to his competency, must be considered as a part of the evidence in this case. *Burdick v. Raymond*, 107 Iowa, 228.

III. The circumstances disclosed by this record throw much light on the oral testimony bearing directly on the alleged contract. At the time it is said to have been made (1873) but three of the children were living with their parents, Edwin, Mayhew, and Kesiah. The latter remained at home until married, in 1879, but in the meantime had not learned of the alleged transfer of the farm. Mayhew was three years younger than Edwin, not physically strong, but worked continually on the premises up to the date of the father's death. Appellee, when asked whether Mayhew shared the crops "during the years he was on the place," answered, "Yes, we had them altogether." When Mayhew left, immediately after his father's death, in 1891, the cattle were equally divided, each obtaining seventeen head, and Mayhew had eight horses. He, too, had been kept in ignorance of this alleged contract. The father, who was a vigorous man of 64 years in 1873, worked according to his strength, at all times having stock of his own on the place, though he did little save care for the bees for several years before his death. The plaintiff performed the household duties for the family until appellee's marriage, in 1888. It would seem from these circumstances that there is quite as much ground for claiming that these parents cared for Edwin as that he had cared for them. True, he directed the work and managed the affairs on the farm. This was not at all out of keeping with the situation, as he was robust in health and possessed of business capacity. Each of these men assisted in performing the necessary labor, though appellee operated another farm for two, and a thresher for ten, seasons, and acquired an adjoining forty acres. Each kept stock on the land without thought of rent. The buildings and stock were insured in the name

of all three. The taxes were assessed in the name of the father, and the receipts ran to him. The mother kept the house as stated. Indeed, there was nothing to point out Edwin as the proprietor, but everything to indicate that he took the lead, as the older and stronger son, in the management of the farm. A barn was built; an addition put on the house; thirty-five acres of brush land cleared, and the farm fenced. Nothing in this record shows the money from which Edwin paid for the help and lumber to make these improvement was not derived from the profits of this land, and from the manufacture of tobacco and the care of bees by Asa S. Chew. All worked, and no reason is suggested by the record for forgetting Mayhew, and giving all to Edwin.

IV. As seen, the facts of the case tend to refute any claim of the existence of such an agreement as is declared by the appellee to have been made. His testimony, in the absence of proper objections, must be considered, though in the light of the facts affecting his credibility. Such agreements are founded, not so much on the promise of food and raiment, as the loving care of filial affection. And if it may be inferred from the situation of the parties that the parents were to be maintained, if at all, where they had lived so long, the keeping pledged should not be understood to be that which might be exacted for compensation from a stranger. The element of duty enters into every such agreement, and, if this is shown to have been ignored, that fact, of necessity, has an important bearing in determining whether any obligation had been assumed or fulfilled. The plaintiff may have left the farm in 1891, when seventy-six years of age, without sufficient excuse, but this in no way justified the appellee's utter neglect of her since that time. True, he insists that he once invited her to live with him, and she put him off, but this is denied by her, and we are inclined to accept her statement. His attitude towards her for six years has been that of absolute indifference, and is

entirely inconsistent with any obligation to give her care and support, and tends strongly to discredit his story. Several members of the family testified that Edwin at first claimed Asa Chew had promised the farm to himself and Mayhew, and that he once agreed to lease it, if the rent was not placed too high. This he denied. To the administrator he paid one hundred and twenty-five dollars, and plaintiff twenty-five dollars, which they supposed to be rent, but, as he claims, on a debt due his father. In view of the denial of all knowledge of such a contract by those likely to have known of it and the circumstances mentioned, we are not inclined to give much weight to appellee's testimony. Other witnesses were called. One Douglas testified to having had several conversations with deceased, at one of which he remarked that "he was getting old, and that he had given the farm to Ed; that Ed was to keep him and his wife during their lifetime, and at their death the farm was to be Ed's;" at another that, "by taking care of him and his wife until their death, the farm was his;" and at still another, that "he was keeping them while they lived, and when they died Ed was to have the farm," and that he had offered Ed a deed, but the latter did not want it. The time fixed was 1887 or 1888. On cross-examination, Douglas was asked whether Asa said, after he and his wife were dead, then the land would be Ed's, and responded, "Yes, I believe, he put it in that way." If Mrs. Holt, a sister of appellee, and her husband, are to be believed, as against Douglas, the latter stated to them in 1894 that he knew nothing of any such arrangement. Joseph Atkinson also testified to having a conversation with deceased, when, in response to an inquiry concerning a shed, he stated "that he knew nothing about such matters; that he had turned the place over to Ed; that he didn't know anything about these arrangements." Had this been said of a stranger, it would have been very significant, but, spoken concerning a son at home, it may well have indicated no more than that he had the management

of the farm. Appellee's cousin S. G. Chew also testified to a conversation, in 1884, concerning some house sills, when deceased remarked that "he had turned the place over to Ed some years ago, and if Ed wanted an addition to the building he would have to build it, he reckoned." Another version of the conversation was given, but we set out what the witness declared to have been the exact language used. Yet, according to the wife of this witness, Asa Chew was at the time claiming the farm as his own, and declaring that he had done enough for Edwin, though the plaintiff is said to have confided to her that the parents were staying with Edwin, and going to do so, and when gone Ed was to have the home. These statements to Atkinson and S. G. Chew are not inconsistent with the conclusion that he had merely turned the management of the land over to his son. To others he made statements tending strongly to show that he did not suppose he had parted with the title. To Abner Atkinson he said, "When we are done with the farm, Ed gets it," or "we are going to give it to Ed," as put on cross-examination; to Efland, that, when he was done with the farm, he expected Ed to have it; to Foster, that he wanted Ed to have the farm when he was through with it; to Gossnell, that Ed had worked hard, and he calculated after his death that he should have the profits of the farm; and, again, that he expected Ed to have the land when he was done with it. He thus relates to what he proposed in the future to do rather than what had been done. He may have wished that Edwin succeed him on the farm; but did he bargain the farm to him? The contention that a contract existed rests in the main on the evidence of appellee and Douglas, each of whom has been somewhat discredited. Had there been such an arrangement, it is all but impossible that Mayhew, Kesiah, and plaintiff would not have been so advised, and their negative testimony, under the circumstances, is in the nature of a denial of its existence. It is hardly conceivable that the almost equal claims of Mayhew to his

father's bounty should have been entirely ignored. No satisfactory explanation of the division of the crops and stock with Mayhew, and the fact of insuring the buildings and stock in the name of the father and two sons, if these belonged to one only, has been attempted. No circumstance, during the eighteen years prior to the time Asa Chew and plaintiff left the farm, inconsistent with his continued ownership, has been proven, and, on a separate reading of the record, we reach the conclusion that appellee has failed to establish a contract by evidence of that conclusive character required by the law. If he has made valuable improvements on the land, these are more than offset by the rents and profits he has received.—REVERSED.

WALTER S. STILLMAN, Appellant, v. JURGEN ROSENBERG and WIFE, Appellants, WILLIAM LARRABEE AND OTHERS and DAVID HENRY WATSON AND OTHERS, Interveners.

Quieting Title; DEED FRAUDULENTLY OBTAINED. Where plaintiff, who had no previous interest in certain real estate, discovering a defect in the affidavit on which the original notice was given in a suit to foreclose a mortgage thereon by publication, secured from the mortgagor a quitclaim deed on a fraudulent representation of his agent that it was wanted to fix up a title, and the mortgagor in executing such deed, believed that he was making the title of the purchaser at foreclosure good, and later executed a second quitclaim deed to the purchaser at such sale, in an action to quiet title, plaintiff had no rights under the deed so fraudulently obtained.

Notice by Publication: JURISDICTION. Where defendant conveyed lands, taking the purchaser's notes and mortgage, and foreclosed on failure of the purchaser to pay, and the affidavit on which the original notice by publication was made, stated that personal service could not be made on the purchaser "within this county," the word "county" being used instead of "state," as required by the statute, the court acquired no jurisdiction to render a decree of foreclosure, and a sale thereunder conveyed no title.

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Supplemental Decree: PENDING APPEAL: *Jurisdiction.* In an action to quiet title after an appeal is taken to the supreme court from a decree of the district court in favor of plaintiff, and giving him a day within which to pay money found due to defendant, the district court has no right to proceed in the case, and render a supplemental decree in favor of defendant for plaintiff's failure to pay the money within the time.

Appeal from Lyon District Court.—HON. WILLIAM HUTCHINSON and GEO. W. WAKEFIELD, Judges.

MONDAY, MAY 14, 1900.

PLAINTIFF commenced this action in equity May 7, 1896, to quiet in him the title to a certain quarter section of land in Lyon county. Issue having been joined, decree was rendered August 19, 1897, quieting the title to said land in the plaintiff on condition that he would, within sixty days from date of said decree, pay into court the sum of two thousand six hundred dollars and ninety-three cents, with interest from the twenty-third day of April, 1897, to the date of payment. On the following day—August 20, 1897—the defendant Rosenberg appealed from said judgment and decree. On January 29, 1898, the defendant Larabee filed his motion asking a supplemental decree dismissing plaintiff's petition, and barring him from any claim in said land, and for judgment against him for costs, because of his having failed to pay said money into court, as required by the decree. On the twelfth day of February, 1898, the motion was sustained, and a supplemental decree rendered accordingly, and from the supplemental decree and from the first decree the plaintiff, on February 14, 1898, appealed.—*Reversed.*

Parsons & Rinaker for appellant.

Geo. H. Stillman, Greenleaf & Greenleaf, and Hoopes & Swearingen for appellee Stillman.

Chase & Dickson and *Wagner & Miller* for appellee.
Larrabee and *Watson*.

WATERMAN, J.—The pleadings are quite voluminous. We shall not set them out, but will endeavor to present all the issues, as we proceed, in such a manner that the points ruled may be fully understood. The defendant *Larrabee* was the owner of the land in question, and on the eleventh day of October, 1883, through his agents, *Miller & Thompson*, sold it to the intervener *Watson*, of Chicago, Illinois, for one thousand seven hundred and ten dollars, receiving one hundred and fifty dollars in cash and the six promissory notes of *Watson* for two hundred and sixty dollars each, for the balance. *Larrabee* conveyed the land by warranty deed to *Watson*, and *Watson* and wife gave back their mortgage thereon to secure the payment of said notes. This transaction was consummated by correspondence between *Miller & Thompson* and a brother of *Watson*, acting for him. *Watson* never took possession of the land, nor made any further payment of the consideration, nor any payment of taxes. He moved from Chicago to Nebraska without advising *Larrabee* or his agents of his whereabouts; and *Larrabee*, concluding, from *Watson's* failure to take possession, or make payments, or assert any right to the land, that he had abandoned it, after default in the payments, took possession, and paid the taxes. Thus relying upon *Watson's* having abandoned the land, *Larrabee* contracted a sale thereof to the defendant *Rosenberg* on the first day of September, 1887, for two thousand two hundred and three dollars; two hundred and three dollars of which was paid in cash, the balance to be paid in installments as specified in the contract. *Rosenberg* took possession of the land, and has ever since held and used the same, has made valuable and lasting improvements thereon, and paid the taxes. Being unable to find *Watson*, so as to secure a reconveyance from him, *Larrabee* commenced his action on the eighteenth day

of April, 1899, against Watson and wife, on notice by publication, to foreclose said mortgage. On June 13, 1889, default was entered against Watson and wife, and judgment for two thousand six hundred and fifty-four dollars and eighty-two cents and decree of foreclosure rendered against them. July 26, 1889, the land was sold, under special execution issued on said decree, to the defendant Larrabee, for two thousand seven hundred and fifty-three dollars and thirty-six cents, and a certificate issued to him, in pursuance of which a sheriff's deed was executed and delivered to Larrabee on the thirty-first day of July, 1890. On the twenty-sixth day of September, 1892, Larrabee and wife, in pursuance of said contract, executed to Rosenberg a warranty deed for said land. On the twentieth day of April, 1896, Watson and wife, for a recited consideration of "one dollar and other valuable considerations," but in fact for the consideration of ten dollars, executed their quitclaim deed of said land to the plaintiff, Stillman. On the ninth day of September, 1896, Watson and wife executed another quitclaim deed to said land to the defendant Rosenberg for a consideration of one dollar. Each of the foregoing conveyances was filed for record, and recorded within a short time after their respective dates. The decree of foreclosure of the mortgage from Watson to Larrabee, and the sale and conveyance of the land thereunder, are only questioned in one particular. The affidavit upon

1 which original notice by publication was made states that "personal service of original notice in said cause cannot be made upon the said David Henry Watson within this county;" the word "county" being used instead of "as required by the statute. The substance of the decree herein, rendered by Hutchinson, J., is as follows:

The court found that plaintiff is the absolute owner of said land, and entitled to be quieted in his title, as against the defendants and interveners, on condition that he pay the court, within sixty days from that date, the sum of

two thousand six hundred dollars and ninety-three cents, with interest from the twenty-third day of April, 1897, to the date of payment. It was ordered that, if he made said payment within the time aforesaid, the title should be forever quieted in him; and that, in case he failed to pay said sum within said time, "then, in the event of such failure, the plaintiff shall be barred of all right or claim in and to any part of said premises, and his petition in this case shall be deemed dismissed, and he shall be liable for the costs of this suit." It was found that Watson and wife had no right to the land. It was also found that there was due from the plaintiff to Larrabee, on the date of trial, four thousand nine hundred and twenty-three dollars and seventy-three cents, on the notes and mortgage of Watson, which it was decreed plaintiff must pay to redeem the land from said mortgage. It was found that there was due from Larrabee to Rosenberg, at the date of trial, as damages for a breach of the warranty upon the sale of the land, the sum of three thousand four hundred and seventy-seven dollars and fifty-three cents. It was found that there was due from Rosenberg to plaintiff, for the use of the land, after deducting for improvements and taxes, the sum of two thousand three hundred and twenty-two dollars and eighty cents. It was ordered that if plaintiff paid into court said sum of two thousand six hundred dollars and ninety-three cents, as required, one thousand four hundred and forty-six dollars and twenty cents thereof, with interest from the date of decree, be for the use and benefit of defendant Larrabee, and one thousand one hundred and fifty-four dollars and seventy-three cents, with interest from date of decree, be for the use and benefit of defendant Rosenberg. It was further ordered that the costs be deducted from the amount deposited for the benefit of Larrabee. The decree concludes as follows: "The court reserving jurisdiction of this case to make such other and supplemental decree

herein as may be required, either affirming this decree, in case the plaintiff pays into court the amount aforesaid, or dismissing the plaintiff's petition, and quieting the title in the defendant Rosenberg, in case of plaintiff's failure to so deposit."

II. The plaintiff states his objections to the supplemental decree which was rendered by Wakefield, J., as follows: "*First*, that, an appeal having been taken from the original decree long prior to the rendition of the supplemental decree, the district court was deprived of all jurisdiction to render the latter decree; *second*, that the defendants, by taking an appeal, elected not to accept the money which was to be paid for their benefit, and that plaintiff was, therefore, excused from paying the same until the case should be finally determined in the supreme court; *third*, that the defendant Larrabee was not entitled to receive any of the redemption money, and hence had no right to complain of its nonpayment." In *Levi v. Karrick*, 15 Iowa 444, this court said: "That a chancery proceeding, when appealed from after a final decree, can be pending in this and the district court at the same time, subject alike to the control and action of either court, is against the whole theory of our system of jurisprudence. The simple matter of fact is that, when appeal is taken, all power of the court below over the parties and the subject-matter is lost until the cause, or some part thereof, is remanded back by order of this court for its further action." See, also, *McGlaughlin v. O'Rourke*, 12 Iowa, 459. It is insisted that because of the peculiar facts of this case, and because Rosenberg did not give a supersedeas bond, this rule does not apply. We think it is clear that by the appeal of Rosenberg the case was brought fully within the jurisdiction of this court, and that the district court had no further right to proceed in the case. The question whether the plaintiff was entitled to have the land by redeeming from the mortgage was involved in the issue between him and defendant Rosenberg, and

the mere fact that the decree in plaintiff's favor gave him a day within which to pay the money did not reserve to that court, as against the appeal, the right to proceed further in the case. We think plaintiff's first objection to that decree is well taken, and for that reason the supplemental decree is reversed.

III. We now consider the case as presented on the appeals of defendant Rosenberg and plaintiff from the original decrees; and, first, whether plaintiff acquired title to the land by the quitclaim deed from Watson subject
3 to the mortgage. It is not seriously claimed that Larrabee acquired any title through the foreclosure decree and sale thereunder. That decree was rendered without the required notice, and, consequently, without jurisdiction, and was, therefore, void; hence, this case stands as though those proceedings had not been had. The title stood in Watson, subject to his mortgage, and the plaintiff had the undoubted right to acquire title, if he did so honestly. The claim is that he procured it by fraudulently representing to Watson that his quitclaim deed was desired to perfect the title to Larrabee and his grantee under the decree of foreclosure of the mortgage. There is no doubt but that plaintiff, having discovered the defect in said affidavit for publication of original notice in the foreclosure case, and knowing its effect, quietly, shrewdly, and cunningly, and as a matter of mere speculation, proceeded to procure the deed from Watson. It appears that he employed detectives to ascertain the whereabouts of Watson, and, finding the latter had returned to Chicago, his address was secured, and plaintiff sent a quitclaim deed to Mason Bross, an attorney of that city, by mail, with instructions to call on Watson, and pay ten dollars in money if he and his wife would execute it. This deed, after describing the real estate, contained the unusual provision that a right of action for trespass and for rents and profits was also assigned to the grantee. When Bross went to Watson, he represented that the quitclaim

was wanted to vest a good title in some party who desired to purchase. Watson did not suppose he had any claim to the land. He made none, and was quite willing to aid those from whom he had purchased in making a good title. Believing that this was all that was wanted, he and his wife executed the conveyance without reading it. Watson testifies that he never would have made the deed had he supposed it was to be used in defeating the title of his grantors. These facts are practically undisputed, for Bross admits he told Watson the deed was wanted to "fix up" the matter. Watson had no substantial interest in the land that he cared to assert. Indeed, it is quite likely that his laches barred him from asserting any such interest had he desired doing so. *Horr v. French*, 99 Iowa, 73. But, aside from this last consideration, we think plaintiff gained no rights under this deed. Bross' representations were fraudulent, and, being the agent of plaintiff, the latter is bound thereby. This deed was not wanted to fix up a title, but to convey one to plaintiff. If Bross did not affirmatively and positively give Watson to understand that his (Watson's) grantors were interested in obtaining the conveyance, he certainly did so by manifest inference; and this was a fraud. A person may make a false representation by indirect as well as direct statements, and even by keeping silence when he ought to speak. The case of *Rollins v. Mitchell*, 52 Minn. 41 (53 N. W. Rep. 1020), is very similar in its facts to the case at bar, and sustains us in the conclusion that any interest acquired by Stillman under his deed from Watson is held only as a trustee for Rosenberg. See, also, Pomeroy Equity Jurisprudence, section 1053. It is by no means clear that Watson would have understood the clause in the deed assigning a right of action for trespasses and rents as in any way conflicting with the representations made him had his attention been called to the matter at the time he signed the deed. But, however this may be, the doctrine of *McCormack v. Molburg*, 43 Iowa, 561, and similar cases cited by plaintiff,

does not apply. It is not sought here to set aside this conveyance because of this provision. Watson and all other parties are quite willing it should stand just as made, for the purpose for which it was given. Rosenberg prays that his title be quieted against the claims of plaintiff. He is entitled to have this done. Plaintiff's petition will be dismissed, and all costs taxed to him on both appeals.—
REVERSED.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY;
 IOWA CENTRAL RAILWAY COMPANY; and MASON CITY
 & FORT DODGE RAILROAD COMPANY v. LAMBERT W.
 PHILLIPS, County Treasurer of Cerro Gordo County;
 MIKE FORD; R. C. DE LA HUNT AND CITY OF MASON
 CITY, Appellants.

Public Improvement: WHEN TAX FOR LEGAL: *Benefits of tax.* Where
 a city is authorized to make an improvement in a certain dis-
 trict, and assess the cost on all real estate within the district,
 2 the fact that the improvement will not be of any benefit to an
 individual owner of real estate in such district is no reason
 why the tax should not be enforced as to him.

Assessment of Railroads: CONSTRUCTION OF SEWER. Laws Twenty-
 fifth General Assembly, chapter 7, section 11, authorizes cities
 divided into sewer districts to construct sewers, and levy the
 entire cost thereof on all the taxable property within such dis-
 trict. Mason City ordinance, No. 77, section 5, provides that
 the cost of constructing any sewer in any sewer district shall
 be a charge on all real estate. McClain's Code, sections 2016,
 2019, provides for a valuation of the property of railways, for
 the purposes of taxation, by the executive council of state, based
 on the aggregate value of their entire right of way and real estate
 used for depot purposes, and all personal property used in
 4 operating the road, in improving the rolling stock, and for
 the transmitting to the auditor of each county through which
 the road runs of a statement of the pro rata distribution on
 the basis of the number of miles in such county of the assessed
 value of the whole property. No means are provided for a sepa-
 rate valuation of the real and personal property of a railroad.
Held, an assessment of property of a railroad to pay for the

111	377
126	210

111	377
127	471

111	377
131	609

111	377
133	601
133	604

111	377
134	530

111	377
138	85
138	259
138	587

construction of a sewer in a sewer district of the city of Mason City, based on the valuations made by the executive council of state, is void, as being in part a tax on personal property for the construction of the sewer.

Injunction Against Tax for Improvements; CONTRACTOR NOT NECESSARY PARTY. In an action by a tax payer to enjoin the collection of a
1 tax assessed for special improvement, on the ground that it is unlawful as to him, the contractors who are to perform the work are not necessarily parties to the action.

APPEAL FROM ASSESSMENT: *Not only remedy.* Equity will enjoin the collection of a void local assessment, and taxpayers are not
1 relegated to an appeal from the assessment.

Pleading: DENIAL OF INSUFFICIENT ALLEGATIONS. Where, in an action by a taxpayer to enjoin the enforcement of a local assessment,
3 he alleges facts which, if true, do not entitle him to relief, a denial of such facts in the answer will be treated as surplusage.

Appeal from Cerro Gordo District Court.—HON. J. C. SHERWIN, Judge.

MONDAY, MAY 14, 1900.

THE plaintiffs pray that a certain sewer tax levied by the defendant city upon certain properties of the plaintiffs be decreed to be unlawful and void, and that the defendant county treasurer be perpetually enjoined from attempting to collect the same. The defendants Ford and De La Hunt made default, and the other defendants answered as will hereafter appear. Plaintiffs moved for judgment on the pleadings, which motion was sustained, and judgment and decree rendered as prayed, from which the answering defendants appeal.—*Affirmed.*

Richard Wilber for appellants.

Blythe, Markley & Smith for appellees.

GIVEN, J.—I. The pleadings show, in substance, as follows: It appears from the petition that the defendant city is divided into two taxing sewer districts, one of which

is known as the "Willow Creek Sewer District;" that in 1896 the plaintiffs each owned and operated a steam railway extending through or into said district and to other towns in the state. On August 6, 1896, the city, by resolution, in pursuance of an ordinance, authorized the construction of a sewer in said district; "the cost of building the same to be paid by proceeds of a sewer tax to be levied on all the real estate in the district according to its valuation. The sewer was located, and a contract made with the defendants Ford and De La Hunt for its construction. On July 30, 1897, the city council passed a resolution "that a special tax of five cents on the dollar of the assessed valuation be levied on each lot or parcel of ground within the district for the purposes of defraying the expenses of said sewer, and that the clerk prepare an assessment list of each lot or parcel of ground, and the amount assessed against each." The clerk prepared and certified to the county auditor such a list, which included the real estate of the plaintiffs used in the operation of their respective roads within said district. The tax so certified was placed upon the books, and passed to the defendant treasurer for collection with the taxes of 1897, and he was proceeding to collect the same. Plaintiffs allege that neither of them was a resident of, or kept its principal place of business in, said district, and had no property therein, except what was exclusively used in the operation of their several railways; that in said year's the executive council of the state assessed all the property of each plaintiff as a unit, composed of real, personal, tangible, and intangible property, without distinction, according to value, and inseparably; that said tax so certified was arrived at by estimating the supposed length of track of each of said railroads in said district, and computing the value thereof according to the estimation made by the executive council, thus including the personal property of the plaintiffs in the levy, while only the real estate of other owners was so included. They allege that said sewer is of no value to them, and

that the board of supervisors of said county did not in either of said years make to be entered of record any order declaring the length of track or assessed value of any railway line within the said district. The answer, as set out, is as follows: "Denying that said sewer is not or will not be of any special benefit to plaintiffs, but alleges that they will have the same privileges of connection therewith as other taxpayers; admit that the board of supervisors did not in either of the years 1896 or 1897 make an order of record stating and declaring the length of the main track and assessed valuation of either of said railways in said Willow Creek sewer district, as provided by section 2020 of McClain's Code, but deny that the length of main track and assessed valuation of said railways were not stated or determined, and allege that the exact length of track of each of said railways and their assessed valuation within said sewer district was ascertained by the council of said city at the time said taxes were levied; and said taxes are the same, and no more, than if said matters had been determined by the board of supervisors."

II. The defendants Ford and De La Hunt are not necessary parties to this action or appeal, and, not having appeared, will not be further noticed. Appellants insist that the plaintiffs have an adequate remedy at law, "by
1 appeal from the assessment," and are, therefore, not entitled to be heard in equity. If the tax is void, as claimed by the plaintiffs, equity will grant relief. *Standard Coal Co. v. Independent Dist. of Angus*, 73 Iowa, 304; *Brandirff v. Harrison County*, 50 Iowa, 165; *Cattell v. Lowry*, 45 Iowa, 478; *Rood v. Board*, 39 Iowa, 444; *Macklot v. City of Davenport*, 17 Iowa, 379. Whether this tax is void or not is the question involved in the case, and whether relief may be granted in equity depends upon our conclusion on this question. Appellants also insist that plaintiffs are not entitled to relief, for the reason that they do not offer to pay the part of the tax that is legal. Plain-

tiffs are before us averring that no part of the tax is legal, and that it is void in toto, and, if this be true there is nothing legally due from them.

III. We now look to the pleadings to see whether it appears therefrom that this tax is illegal and void. The answer joins but one issue. It denies the allegation that the sewer is of no special benefit to any of the plaintiffs. While the right to levy is limited to real estate within the district, upon the general theory that such property only will be benefited, individual levies are not dependent upon benefits, but upon whether the property assessed is within the district, and of the class authorized to be assessed. This allegation in the petition presents no ground for relief, and therefore the denial must be treated as surplusage, and, thus viewed, the petition stands as confessed.

IV. The proceedings under consideration were had under the law as it stood prior to the present Code, and it is to those statutes alone that we will refer. In ordering and constructing the sewer and in levying this tax the city proceeded under authority of chapter 7, Laws Twenty-fifth General Assembly, section 11 of which provides, in cases like this, "that said city shall have the power to levy the entire cost of such sewer, required to be paid by such sewer district at once, upon all the taxable real property within such district." Section 5 of Ordinance No. 77 of the defendant city provides that the cost of constructing any sewer therein "shall be a charge upon all real property according to its valuation in said sewer district, as provided by law." The resolution levying this tax provided that it be "levied on each lot, part of lot, or parcel of ground within the said Willow Creek sewer district," and instructed the clerk to make out and prepare an assessment list of "each parcel of ground in said district." Nothing further is required to show that only real estate was subject to this tax. Sections 2016 to 2019, inclusive, of McClain's Code

provided for an annual statement, signed and sworn to, from each railway company operating a road in this state, showing the number of miles owned, operated, or leased; the value per mile; the number and value of engines, cars, and property used in operating or repairing the road; the amount of rolling stock and gross earnings in this state; and such other information as the executive council might require. They also provide for the assessment of all the property of each railway corporation in this state "excepting the lands, lots, and other real estate belonging thereto not used in the operation of any railway" by the executive council of the

on 2018 provides that: "The said property ed at its true cash value, and such assessment e upon the entire railway within the state, and the right of way, roadbed, tracks, culverts, depots, station grounds, shops, buildings, gravel other property, real and personal, exclusively eration of such railway. In assessing said rail- equipment said council shall take into consider- ss earnings per mile for the year ending Jan- ceding, and all other matters necessary to ena- cil to make a just and equitable assessment of property." Provision was made for transmit- county auditor of the county through which may run, a statement showing the length of ck of such railway within the county, and the e per mile of the same as fixed by a pro rata er mile of the assessed value of the whole prop- in the preceding section." We have stated ie provisions of these sections to show that its made by the executive council included per- as real property. The value of the personal uch corporations forms an important factor in e value of their property used in the operation nd in many instances largely exceeds the value state so used. The tax in question was levied

upon the valuations of plaintiffs' property assessed by the executive council, and is, therefore, in part, a tax on personal property to pay for the construction of a sewer, and to that extent is unquestionably illegal and void, as only real estate may be taxed for that purpose. There is no provision in the law requiring separate valuations of real and personal property of railway corporations by the council, and no means provided by which the valuation made by the executive council may be separated, and the value of either class ascertained. This may be an unintentional omission in the law, but it is certainly true that no basis is provided for assessing railway companies on their real estate used in the operation of their roads apart from their personal property. The omission may have been intentional upon the theory that such property of railway companies would not be benefited by the improvement, or not benefited to the extent that other real estate in the district would be benefited. Whatever the reason may be, the fact is that no means are provided for ascertaining the value of real estate used in the operation of railroads for the purposes of taxation separate from their personal property. Much is said in argument about equality in taxation, and many authorities are cited. In forming statutes authorizing taxation, the nearest attainable equality is always sought for, but the statute stands as the measure of equality, and, though formed with the utmost care, inequalities are unavoidable. If plaintiffs are taxed upon the assessment made by the executive council, then they are taxed on personal property to pay for the sewer, while only real estate may be taxed for that purpose, and they are taxed on their personal property while other owners are only taxed upon real estate. If this tax is held void, the real estate of the plaintiffs within the district used in the operation of their roads escapes taxation in aid of the construction of this sewer, but, as already stated, such a difference may have been intended. It has been uniformly held that there can be no taxation except as authorized by statute or constitutional provision, and that the

taxing power can be exercised only in accordance with the forms of law. In *Tallman v. Treasurer*, 12 Iowa, 531, it was held that "property can be taxed only when authorized and required by the lawmaking power, and then only in the manner prescribed by law." See *Worthington v. Whitman*, 11 Iowa, 1; *Appanoose County v. Vermilion*, 70 Iowa, 446, and *Id. v. Board*, 39 Iowa, 446, it is said: "As the supervisors had no authority to increase the assessments levied upon such enhanced valuation are not lawful, but illegal. The assessment by competent authority is essential to the validity of a tax." See, also, *County v. Southern Pac. R. Co.*, 118 U. S. 394 (1886), 30 L. Ed. 118, and *California v. Southern Pac. R. Co.*, 127 U. S. 1 (1888), 8 Sup. Ct. Rep. 1073, 32 L. Ed. 118.

We conclude, upon the facts as shown in the case, and these authorities, that the tax in question is void, and therefore the judgment and decree of the court are AFFIRMED.

MR. JUSTICE, took no part.

CONNORS V. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

"OPERATION OF RAILROAD" DEFINED: *Setting out fire.* A fire set out by section men in burning the grass along a railroad right-of-way is not set out in or caused by operating a railroad; therefore, in an action for damages sustained from a fire so set out, the burden is not cast on the defendant to show its freedom from negligence in allowing the fire to escape and in failing to put it out, under Code 1873, section 100, providing that, in an action for damages from a fire caused by the operating of any railway, it shall only be necessary for plaintiff to prove injury to, or the destruction of, property.

Appeal from Kossuth District Court.—HON. F. H. HELSELL,
Judge.

TUESDAY, MAY 15, 1900.

ACTION for damages occasioned by a fire alleged to have been set out and negligently permitted to escape by defendant's employes when burning weeds and grass along its right of way. Verdict and judgment for the plaintiff, and the defendant appeals.—*Reversed.*

Hubbard, Dawley & Wheeler for appellant.

Clark & Cohenour and *F. M. Miles* for appellee.

LADD, J.—The fire which destroyed the plaintiff's hay and injured his slough originated from a fire set out by the defendant's sectionmen in burning the grass and weeds along its right of way, or else from a sinder pile dumped from a thresher engine previously operated on the premises. In either event, recovery could only be had from the party at fault on an affirmative showing of negligence. This is conceded, unless it may be said that the fire was "set out or caused by operating" the defendant's railway. See *Gandy v. Railroad Co.*, 30 Iowa, 420. If so done, then, under section 1289 of the Code of 1873, the burden of proof was upon the defendant to show the exercise of care on the part of its employes. *Small v. Railway Co.*, 50 Iowa, 338; *Rose v. Railway Co.*, 72 Iowa, 625; *Engle v. Railway Co.*, 77 Iowa, 666; *Metzgar v. Railway Co.*, 76 Iowa, 387. The important inquiry, then, is, what is meant by "operating a railway?" In none of the cases heretofore determined has the application of the statute gone beyond a fire set out or caused by an engine on the track. But under the co-employes' act (Code, section 2071), allowing recovery by an employe injured by negligence "in any manner connected with the use and operation of any railway on or about which they shall be em-

ployed," the clause "use and operation of any railway" has been frequently considered and defined. Thus, in *Stroble v. Railway Co.*, 70 Iowa, 560, the court, through Beck, J., said: "What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? They can be operated in no other way than by the movement of trains." In *Nelson v. Railway Co.*, 73 Iowa, 576, the movement of steam ditching machines, and in *Larson v. Railway Co.*, 91 Iowa, 81, that of a hand car, were held to be operating a railway. In *Akeson v. Railway Co.*, 106 Iowa, 64, after reviewing the authorities, the court concluded that: "The only dangers peculiar to railroading are those occasioned by the movement of the engines, cars, and machinery on the track, or directly connected therewith. It is evident that the statute contemplates such injuries only as are caused by the negligent acts of employes so engaged. In no other proper sense is a railway used and operated. * * * If, then, the injury is received by the employe whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employe in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this the statute affords no protection." Appellee relies somewhat on the language employed in *Haden v. Railway Co.*, 92 Iowa, 229. There the employe whose negligence caused the injury was conceded to be engaged in the use and operation of a railroad, as it was occasioned by the movement of a train in his charge. The inquiry made in the second paragraph of that opinion related to the exposure of plaintiff to the peculiar hazards of railroading, and what was said must be construed with reference to that subject. Haden was held to have been so exposed, and, having been found to belong to this class, it was quite immaterial whether he was also connected with the use and operation of the road. It may be remarked, however, that an employe, "in keeping in

repair the track of a railroad for the present operation of its trains," while he may be exposed to the hazards, is not engaged "in the business of operating a railroad." Such work is undoubtedly necessary therefor, but not in any way connected therewith. We are content with the conclusion reached in *Akeson's Case*—that a railroad is only operated, within the meaning of the law, by "moving trains, cars, engines, or machinery on the track." The same definition is peculiarly applicable to the clause "operating any such railway," contained in the statute relating to fires. Locomotives, trains, or machinery passing along the tracks are entirely within the control of the company, and are usually beyond easy reach before the damages caused by escaping sparks or fire can be known. To obviate the all but insurmountable obstacles in the way of the injured party adducing affirmative proof of its negligence in order to recover, this statute, casting the burden of proving care on the railway, was enacted. It is limited to a situation, however, peculiar to railroads (i. e. their operation); otherwise, it might fall beneath the denunciation of the constitution, as class legislation. For discrimination by the legislature must rest upon some apparent natural reason, "suggested by a difference in situation and circumstances of the subjects placed in different classes, as suggests the necessity or propriety of different legislation with respect to them." The evidence is quite as available in the case of a fire set out by the sectionmen on the right of way as when started by a neighboring farmer or other person, and we can think of no reason for applying a rule in the one case which does not obtain with equal propriety in the other. See 3 Elliott, Railroads, section 1242. It follows that the court erred in directing the jury that, if the damages were caused by fire set out by defendant's sectionmen on the right of way, the plaintiff had made a *prima facie* case, and that thereupon the burden was on the defendant to show its freedom from negligence in allowing the fire to escape, and in failing to put it out.—REVERSED.

JAY J. SMYTH V. PETERS SHOE COMPANY, Appellant.

Statute of Frauds: WRONGFUL ATTACHMENT: Foreign corporations.

Code, section 3452, providing, "When a cause of action has been fully barred by the laws of any country where the defendant

- 1 has previously resided, such bar shall be the same defense as though it had arisen under the provisions of this chapter, but this section shall not apply to causes of action arising within the state," applies to an action for wrongful attachment made in another state by a corporation organized under the laws thereof, and residing therein.

RUNNING OF STATUTE: Intervention. The statute begins to run against an action for wrongful attachment from the time of entry, or at least from the time the property was sold in the attachment suit; and not from the time of final judgment in said suit against the plaintiff therein, though the plaintiff intervened therein, and though, after the owner's intervention, he was made a defendant in such suit.

in Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

TUESDAY, MAY 15, 1900.

Petition filed by plaintiff on the twenty-fourth day of May, 1897, was aided by attachment, and recites that Peters-Miller Shoe Company was, in the year 1891, a corporation duly organized and existing under the laws of the state of Missouri; that after the acts commenced by said company the Peters Shoe Company was incorporated in Iowa and succeeded to the rights and business and liabilities of the first-named company. It is further stated that in March, 1891, the Peters-Miller Shoe Company brought suit by attachment against one Casebeer in the circuit court of Wayne county, Mo., and in said action judgment was rendered and caused to be sold a large quantity of merchandise belonging to plaintiff; that plaintiff intervened in said suit and setting up his title to the property so taken; that

on a trial in the circuit court verdict and judgment were rendered against plaintiff, but on appeal this judgment was reversed, and the case remanded, and on a second trial judgment was entered establishing plaintiff's ownership of said property; that the date of final judgment was November 1, 1896. There was a second count in the petition, but, so far as the questions we have to consider are concerned, it is needless to set it out. It but repeats in a different form the facts already stated, and alleges that the plaintiff in attachment charged that plaintiff here was a partner with Casebeer. The answer puts in issue the material allegations of the petition, and sets up the statute of limitations. On motion of plaintiff, at the close of the testimony the court instructed the jury to find for him in the sum of one thousand four hundred and forty-one dollars. This was done, and from the judgment rendered thereon this appeal is taken.—*Reversed.*

Preston & Moffit and Lubke & Muench for appellant.

Jamison & Smyth for appellee.

WATERMAN, J.—We need consider but one of the several matters discussed, and that is the plea of the statute of limitations. The levy of the attachment was made on March 18, 1891. The sale was had April 24th of the same year, and this action was not begun until December 24, 1897. Under the statutes of the state of Missouri, where the cause of action arose, and where defendant resides, an action of this kind is barred in five years. Section 3452 of our Code provides: "When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense as though it had arisen under the provisions of this chapter, but this section shall not apply to causes of action arising within the state."

1 That this section applies to a case such as we have here seems manifest from its terms. This court has

in several instances construed it according to its plain import. *Lloyd v. Perry*, 32 Iowa, 144; *Lebrecht v. Wilcoxon*, 40 Iowa, 93. We are cited by appellee to the case of *Winney v. Manufacturing Co.*, 86 Iowa, 609, as holding that a foreign corporation cannot avail itself of the defense of the statute of limitations of this state. The question at issue there was, under what circumstances a foreign corporation could set up the bar of the Iowa statute. Here it is claiming the bar of its home statute, under which the cause of action arose. *Lebrecht v. Wilcoxon* is in point on the proposition that a defendant does not have to become a resident of this state to enable him to plead the bar of a foreign statute.

II. It is contended further by appellee that his cause of action did not accrue until the final determination of the attachment suit in which he intervened. This was in November, 1896. We think this court
2 has settled the question that the cause of action accrues when the property is taken, or at the latest when it is sold under the writ, in a case of this nature. The fact that plaintiff intervened would not toll the statute. *Garrett v. Bicklin*, 78 Iowa, 115, was an action for damages for the wrongful seizure of plaintiff's property under a writ of attachment against another. Garrett intervened in the attachment suit, claiming to be the owner of the property. When he brought suit for damages, the statute of limitations was set up, and on this issue this court said: "Appellant's [plaintiff's] theory is that the cause of action arose at the date of the final judgment in the former proceeding, April 21, 1886; while that of appellees is that it arose when the property was first taken on attachment, in March, 1882, or at furthest when it was sold and converted by virtue of the special execution in April thereafter. To the query, could the plaintiff in 1882, when the property was wrongfully taken, or when it was wrongfully sold and converted, with no other suit pending, have commenced this

proceeding to recover its value? there can be but one answer, and that is in the affirmative. The answer should be decisive of the question presented by the demurrer unless there is something in the fact of the intervention proceeding to defeat that right. It must be conceded that after the seizure of the property, and before the filing of the intervention petition, Garret had his choice of remedies as between the intervention proceeding to secure the property and an independent one to recover its value. We do not understand that, where a party has a choice of remedies, and makes his election, the statute ceases to run as to the other remedy. We think that a right of action arose in this case at furthest when the property was sold, and the proceeds paid to defendant herein.

* * * We are referred to no authorities, and we see no reason for holding, that the statute will cease to run to enable a party to first determine his ownership of property, and then, by another proceeding, recover its value, when pending the first proceeding, it is apparent that an action for value is the only available one, and open to his choice therein." See, also, *Valley Bank of Clarinda v. Shenandoah Nat. Bank*, 109 Iowa, 43. It is in evidence that under the statutes of Missouri plaintiff had the same remedies as are given by our Code, and his election was identical with that made by Garrett in the case from which we have quoted.

Something is claimed for the alleged fact that this plaintiff was made a defendant in the original attachment suit. It is thought because of this the statute could not begin to run until final determination of that action. If this fact would alter the rule,—a question we do not determine,—it can have no weight here. The petition makes no such claim. The allegation that plaintiff intervened in the attachment suit is inconsistent with the theory that he was a defendant, for a party to an action cannot intervene in it. The evidence all shows that plaintiff did intervene. The files in the attachment case were not offered in evidence on this trial. The only foundation for the claim that Smyth

was a defendant is in this statement made by him when on the witness stand: "They [the attachment plaintiffs] amended their petition, and made me a party to the suit by claiming that I was a partner of Casebeer's. I think this was before I interpleaded, though I may be mistaken." If it was done after the interplea, it could not affect the matter we have under consideration; and it does not appear but this was the case. It is not denied that in response to the interplea the plaintiffs in attachment, by reply or answer thereto, alleged that Smyth was a partner of Casebeer, and we are inclined to believe in this way only was such a charge made. We conclude, on the whole, that this action was barred, and it was error to render judgment in plaintiff's favor.—REVEREND.

E. FISK, Administrator of the Estate of Robert P. Lutz,
Deceased, Appellant, v. THE CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY COMPANY.

NEGLIGENCE AFTER DANGER IS PERCEIVED. Where a workman on a railroad track, on an earth embankment, the sides of which began to slope at the end of the ties of the two tracks stepped back from the north track, out of the way of a train going east, onto the south track, and was thereon going east, onto the south track, and was thereon the engine of a train going west on that track, the having passed one hundred feet east of that point, the workman in charge of the west bound train cannot be held to have been negligent after his peril was, or by the exercise of due care should have been known to them, they having given no warning signal when he was seen to approach their track, and they stepped backward in time to have crossed their track before their engine reached that point, they had a right to expect that he would cross it, and, if he did not step back in time to cross it, they did not have time in which to avoid the collision after his peril was or could have been known.

NEGLIGENCE: Jury question. A workman on an earth embankment just wide enough for the two railroad tracks with only sufficient space between them for safe passage

- of cars, but down the north side of which he could have gone to a place of safety, continued at his work of scattering cinders (no foreman being present) till a train thereon going east was
- 3 near him, when, without looking, he stepped back on the south track and was struck by a train thereon going west; the engines having passed one hundred feet east of that point.
- 4 *Held*, that he was guilty of contributory negligence, notwithstanding a rule of the company that "trackmen must keep close watch of passing trains, and when anything wrong is discovered, immediately signal the engineer or trainmen, and use every effort to stop the train."

Appeal from Cedar District Court.—HON. H. M. REMLEY, Judge.

TUESDAY, MAY 15, 1900.

PLAINTIFF asks to recover damages by reason of certain alleged acts of negligence on the part of the defendant which it is averred caused the death of plaintiff's intestate, without fault or negligence on his part contributing thereto. The defendant answered, denying that it was negligent as alleged, and denying that deceased was free from negligence. At the conclusion of the evidence for the plaintiff, defendant moved for a verdict, which motion was sustained, and verdict and judgment for defendant rendered accordingly. Plaintiff appeals.—*Affirmed*.

Rickel & Crocker and *Preston & Moffit* for appellant.

J. C. Cook for appellee.

GIVEN, J.—I. The defendant owned and operated two tracks of railway from Marion, Iowa; one running westward to Council Bluffs, and the other southwest to Kansas City, Mo. These tracks were parallel and close together for some distance west of the station in Marion, and were laid on a bridge spanning Indian creek, and one spanning an undergrade highway crossing, and upon an embankment about twenty-five feet above the natural surface, which had

been formed by filling in earth along a trestle that had been formerly used. These two tracks belonged to the defendant, and the deceased had been in the employ of the defendant as a sectionman on the Council Bluffs line for a year or more, and was familiar with these tracks immediately west of Marion, and with the manner of operating trains thereon. On the ninth day of November, 1895, about 8 o'clock in the morning, the deceased and one Taylor were engaged, at a point on said embankment within the limit of the city of Marion, in scattering cinders that had been deposited on the north side of the Council Bluffs track, which lay immediately north of the Kansas City tracks, with only sufficient space between for the safe passage of cars. With no train upon the track to obstruct the view, these men could see westward for a mile or more, and eastward for at least one thousand feet. While they were at work a freight train from the west on the Council Bluffs track whistled for the station at or near the post about seven hundred feet west of them, and, as it approached they stepped backward, with their faces to the north, onto the Kansas City track. A freight train had started west on the Kansas City track at such time as that the engines passed at about 100 feet east of where the men were. It is evident that deceased was not aware of the approach of the train from the east, as he remained on or so near its track that he was struck by the engine and killed.

II. The grounds of defendant's motion for a verdict, necessary to be noticed, may be summed up as follows: That plaintiff failed to show that the defendant was guilty of negligence as charged, or that the negligence charged
1 was the proximate cause of the accident; that the evidence fails to show that the deceased was free from negligence, and does show that the deceased was guilty of negligence contributing to his injury. The negligence charged is "that while said Robert P. Lutz was so situated and being, and absorbed in his work as aforesaid, and in

the discharge of the duties required of him by the rules of the defendant company, the defendant company carelessly and negligently ran two trains upon and over said tracks at said point, but going in opposite directions; and the same, in violation of law, were at that time running at a high and dangerous rate of speed, and in violation of the ordinances of said town of Marion; and that without any signals or warnings of any kind, and illegally and wholly disregarding the duty that said defendant owed to said decedent, and of the precautions that should have been taken for his safety, ran one of said trains, to-wit, the one running on the Kansas City division, over, against, and upon said decedent, bruising, crushing, and killing him, while said trains were passing each other at or near said point." An ordinance of said city of Marion provides as follows: "That no locomotive engine, railway passenger car or freight car shall be driven or run upon or along any railroad track located upon a street within the corporate limits of the city of Marion at a greater speed than the rate of six miles per hour." The evidence shows that these tracks were not upon any street within that corporation at the place of the accident, nor for a considerable distance east thereof. Said ordinance also provided that "the bell of each locomotive engine shall be constantly rung while moving within the city limits." The evidence shows that these trains were both being run at the speed of about twenty-five miles an hour. If it may be said that this was not in violation of an ordinance, because not upon tracks located upon a street, still it may be questioned whether, under the circumstances, the speed was negligent. The evidence tends to show that the bell was not rung on the Kansas City engine, and that no signal was given from that engine until the deceased and Taylor were seen to approach or come upon the Kansas City track, when the usual danger signals by whistle were given. Our conclusion on the question of contributory negligence renders

it necessary that we determine whether the evidence fails to show negligence on the part of the enginemen.

2 We are in no doubt that it fails to show negligence on their part after the peril of deceased was, or by the exercise of care should have been known to them. If he stepped backward in time to have crossed their track before their engine reached that point, they had a right to presume that he would cross it. If he did not step back in time to cross it, they did not have time in which to have avoided the accident after his peril was or could have been known.

III. We next inquire whether the court was warranted in holding as a matter of law, that the deceased was guilty of negligence contributing to his inquiry. He continued at his work after the east-bound train whistled for the station until it was near to him, and then, without
3 looking, as he could have easily done, to see whether a train was coming on the Kansas City track, as he knew was possible, he stepped backward over the few feet between the tracks onto or near the south track, where he stopped, and in a moment after was struck and injured. It is insisted that owing to the form of the embankment, and close proximity of the two tracks, there was no other place to which the deceased could have gone, out of the way of the east-bound train. We think it was entirely possible for him to have gone down either side of the embankment, especially the north side, to a place of safety from both trains. It appears that the defendant had in force a rule as follows: "(118) Trackmen must keep close watch of passing trains, and when anything wrong is discovered, immediately signal the engineer or trainmen, and use every effort to stop the train." It is insisted that, in view of this rule, the deceased was not negligent. This rule did not require the deceased to go to the place he did, nor to any other place of danger. He was not required to go where he did in the performance of any duty. No duty devolved upon him but

to look out for his own safety until the east-bound train was passing the place where he was. It was not until then that he was required by the rule to observe the passing train. It was before that duty was required that he was negligent in stepping back onto the south track without looking to see if a train was approaching thereon. It is evident that, not thinking that a train might come on the south track, he, without looking, went onto that track, as the most convenient place to avoid the east-bound train. The case is not similar in its facts to that of *Tobey v. Railway Co.*, 94 Iowa, 257 as relates to this question. In that case Tobey, a trackman, was engaged in driving a spike in one of the tracks. Just before he commenced driving he looked southward, and saw that no cars were approaching. While driving he observed an engine coming from the north on the track where he was working, and he continued to drive, so as to get the spike out of the way of the engine, until the engine was within ten or fifteen feet of him, when, without looking south again, he stepped back near another track, and was struck and injured by cars being moved from the south on that track. At the moment when he stepped back his attention was attracted by the efforts of a fellow workman to get a foot adz out of the way of the engine. He testified: "As I looked at this foot adz on the track, I was in the act of looking south; but this man attracted my attention, who was attempting to take the foot adz off the rail, for five or six seconds." This court said: "We do not think that it can be said, as a matter of law, that plaintiff, under these circumstances was negligent. He was justified in working as he did, and in finishing driving the spike, so that the engine might pass in safety over the crossing. The interval of time after he stepped off the track until he was struck was so short that it is not clear that he was not excusable for failing to see the approaching cars on another track. Besides, his attention was diverted by the effort of his companion, Scheeler, to get the adz off the track from in front of the

approaching engine. The evidence shows without conflict that after the men halloed to him he did not have time to avert the accident. His companion did not observe these cars. After stepping off the track, plaintiff started to look in the direction from which these cars came, but was startled, and his attention attracted, as we have said, by the attempt of his companion to get the adz off the track. We cannot say that his failure to observe the approaching cars and the danger of their striking him, under such circumstances, was negligence." The differences between that case and this, bearing upon the question of contributory negligence, are these: Tobey was at the only place where his employment permitted him to be at the time, and was not negligent in being there, while the deceased was negligent in going where he did, instead of to the places of safety that were open to him. Tobey exercised care for his own safety by looking before he commenced driving the spike, and would have looked again if his attention had not been diverted, while the deceased, with ample opportunity to have looked in time to have avoided the accident, did not do so. The first duty of each was to himself, and Tobey carefully observed that duty up to the moment his attention was diverted, while deceased acted in utter disregard of his own safety. The duty of the deceased to observe the passing train did not require him to go into the place of danger, nor did it prevent him from looking and seeing the danger in time to avoid it. In *Tobey's Case*, the

whose duty it was to warn the trackmen of approaching trains was present, but did not warn Tobey. In , as the deceased must have known, the foreman was a fact that called upon him to exercise greater care for himself.

have given unusual care to the consideration of this record, and think that but one conclusion can be reached from the evidence, and that is that the death of deceased was contributed to, if not solely caused, by negligence.—AFFIRMED.

WATERMAN, J.—(dissenting). As I understand the majority opinion, there is a virtual concession that the case should have gone to the jury on the issue of defendant's negligence. At any rate, I do not feel called upon to say more on that point than merely call attention to the facts as they are set out by Mr. Justice Given. Their force and effect are apparent. The question is not whether we think from the testimony that defendant was negligent, but, might a jury reasonably have so found? The principal issue discussed by counsel, and the one to which most attention is devoted in the majority opinion, relates to the contributory negligence of deceased, and I shall take that question up for a somewhat critical examination. While deceased was obliged to look out for passing trains, this duty must be considered in connection with other duties imposed upon him. I need give attention to one only of these other matters. One of the rules of defendant company was as follows: "Trackmen must keep a close watch of passing trains, and, where anything wrong is discovered, immediately signal the enginemen or trainmen, and use every effort to stop the train." Whether deceased could have performed the duty enjoined upon him by this rule, had he attempted to descend the bank, was for the jury to say. If he could not, then it was clearly for them also to say whether he was negligent in attempting to perform these conflicting duties, one of which called upon him to be watchful for his safety, while the other put him in peril; for I shall show hereafter that he was in danger if he remained on the top of the embankment while these trains passed him. If the case of *Tobey v. Railway Co.*, cited by the majority, is to stand, the principles decided should certainly rule a case like this, where the person injured was perhaps confused by opposing duties. The majority seek, however, to distinguish the *Tobey Case* from the one at bar on two grounds: (1) That Tobey was where he had a right to be when he was injured. If this is correct, then Lutz was where he had a right to be, for both were en-

gaged in repairing the track. (2) It is said that Tobey looked for an approaching train before stepping back into a place of danger. He looked, it is true, before he began driving the spike, but how far he could see down the track does not appear. He says it was a minute or a minute and a half after he looked before he stepped back to the place where he was struck. In that time the cars, running as they were at a rate of eight or ten miles an hour, would have come to the place of the accident from a point one-sixth or one-seventh of a mile distant. It is not shown that Tobey could see so far. His looking down the track for danger did not excuse him, because it does not appear the danger was in sight to which he was exposed when he went upon the track a minute or more later. If Tobey had looked at the time he stepped back, there would be some foundation for the distinction, but under the facts shown there is none. While the fact that he so looked is mentioned in the opinion, it is but as an incident, merely, and not as an essential factor in the case. It is further said by the majority that the rule requiring deceased to observe passing trains did not compel him to go into a place of danger, nor absolve him from the duty of watching the passing trains. I grant this. But was it not for the jury to say whether, in the emergency presented, and in trying to perform all the duties imposed upon him, Lutz was negligent in acting as he did?

II. If it should be conceded that deceased was negligent, there was still an issue for the jury. Was defendant guilty of negligence after Lutz's danger was discovered? In considering this point it is necessary to keep clearly in mind the place where these men were working, as it was at the time of the accident. As said by the majority, deceased was upon the top of an embankment twenty-five feet high, which afforded a bed for two parallel tracks of defendant's road. The slope of the sides of this bank, as one witness says, was "about as steep as you could pile dirt." The slope began immediately at the ends of the ties. Another witness says

there is no place on the surface of the embankment, outside the ties, where "a person can walk." The two tracks were from seven and nine-tenths feet to eight and six-tenths feet apart. The sides of a freight car (and both of these trains were composed of cars of that kind) project out over the track from twenty-six to thirty-three inches. At the time of the accident both trains were running at the rate of about twenty-five miles an hour. They were passing each other when they reached the place of the accident. The evidence tends to show that a man on the engine which struck deceased was looking forward as the train moved towards the place where the latter was working. The situation and movements of deceased could have been seen for a long distance. It was apparent the two trains would pass at about the point where he was at work. With these trains passing at a high rate of speed, there was no place of safety on top of the bank. It was also apparent that deceased, at the rate he was moving, would not be able to cross the Kansas City track in front of the train; for he was struck, as some witnesses say, almost instantly after he stepped on the track. The persons in charge of the engine will be presumed to have knowledge of the rule we have set out, requiring deceased to observe passing trains. When deceased stopped his work on the Council Bluffs track and started to move across the surface of the embankment, his danger was, or should have been, apparent to an onlooker. When one of the men on the engine that struck deceased was first seen looking forward, the Kansas City train was some three hundred and fifty feet from deceased, and the latter had then started to leave the track on which he was working, yet there is testimony to show that no warning was given until just as deceased was struck. The majority opinion disposes of this branch of the case on the assumption that those in charge of the Kansas City engine had no occasion to suspect danger to deceased until he stepped between the rails of the track on

which they were running. But, under the facts which we have set out, no such rule prevails. In *Moore v. Railroad*, 47 Iowa, 689, this court said, on a somewhat similar state of facts: "The defendant asked an instruction to the effect that if, when the section hands on the car saw the plaintiff, he was not on the track, then they were not bound to stop the car or slacken the speed. This was refused, and the ruling is assigned as error. It was clearly incorrect. If plaintiff was not, when first seen by the workmen, upon the track, but approaching it, with apparent intention of going upon it, without discovering the car, ordinary care required its speed to be slackened. The duty of those on the car required them to stop it, if danger was threatened to plaintiff, whether he was on the track, near it, or approaching it." Of course, in what we say of the facts, we take the testimony most favorable to plaintiff. This she is entitled to have done. The case should have gone to the jury.

SHERWIN, J., joins in this dissent.

IOWA SAVINGS & LOAN ASSOCIATION, Appellee, v. M. A. SELBY AND EMMA SELBY, Appellants, P. W. BROWN, E. E. MCCALL AND MADISON COUNTY, IOWA, Defendants.

Statutes: CONSTITUTIONAL LAW.* Acts Twenty-seventh General Assembly, chapter 48, amending Code, section 1898, and providing that such section shall govern all contracts between building and loan associations and other parties made before the Code 2 took effect, and that such contracts shall be construed and enforced in actions and proceedings as therein provided, with the same effect as if made after the Code took effect, is not expository legislation, but curative merely.

TITLE. The title to Acts Twenty-seventh General Assembly, chapter 48, enacted as a curative act of Code, section 1898, regulating building and loan associations, and entitled "An act to amend section 1898 of the Code relating to building and loan

111 402
117 598

111 402
121 450

111 402
131 348

associations," being plain, broad, and directing attention to the
1 general subject of such associations, is not in violation of
Constitution, Article 3, section 29, requiring the subject of
the act to be plainly expressed in its title.

Pleading: DENIAL OF CORPORATE CAPACITY. Where, in an action by a
corporation, it pleaded its corporate capacity under existing
laws, defendant's denial of want of information with reference
3 thereto is insufficient to require plaintiff to prove such capacity.

PLEA AND JUDGMENT. Where plaintiff in a mortgage foreclosure suit
did not ask to be allowed for certain taxes paid on the prop-
4 erty, in his petition, the allowance thereof in the decree of fore-
closure was erroneous.

Appeal from Madison District Court.—HON. J. H. APPLE-
GATE, Judge.

TUESDAY, MAY 15, 1900.

ACTION in equity to foreclose a mortgage executed by
M. A. Selby and Emma A. Selby. There was a decree of
foreclosure for the plaintiff. Defendants M. A. and Emma
A. Selby appeal.—*Affirmed.*

Clark & McLaughlin for appellants.

Bailey, Ballreich & Preston for appellee.

SHERWIN, J.—The appellee is a mutual building and
loan association, originally organized in 1889, and alleges
that on July 2, 1896, it so amended its articles of incorpora-
tion as to comply with the provisions of chapter 85, Acts
Twenty-sixth General Assembly. M. A. Selby is a member
of the association, and the holder of ten shares of its stock.
In 1894 he borrowed one thousand dollars of the association,
and executed his note therefor, and a mortgage to secure the
same. The note and mortgage provide for the payment of
certain sums monthly, as dues, premium, and interest. This
action is to foreclose the mortgage. The defendant Selby
pleads usury, breach of warranty as to the maturity of his

stock, and that chapter 85, Acts Twenty-sixth General Assembly, and chapter 48, Acts Twenty-seventh General Assembly, are unconstitutional and void, as to the note and mortgage in suit. The original loan was tainted with usury.

I. The constitutionality of chapter 85, Acts Twenty-sixth General Assembly, and of chapter 48, Acts Twenty-seventh General Assembly, was expressly determined and sustained in *Association v. Heidt*, 107 Iowa, 297;

Association v. Curtis, 107 Iowa, 504. In this

1 case, however, the appellant attacks the latter section on the additional ground that it violates section 29 of article 3 of the constitution of Iowa, which provides that "every act shall embrace but one subject and matters connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." The title to chapter 48, Acts Twenty-seventh General Assembly, is in the language following: "An act to amend section 1898 of the Code relating to building and loan associations." The appellant contends that this title does not indicate the subject involved therein. It certainly indicates the general subject involved therein, because it says in plain and explicit words that it is an act to amend the law relating to building and loan associations, and, further, gives the section it is proposed to amend. The legislature had the power to pass a curative act relating to these associations, and this legalizing act was germane to the subject expressed in the title. If the title had pointed out the precise amendment that was sought, and the act itself had provided for something foreign thereto, then appellants' position would be well taken. Nobody could have been misled by this title. It was plain and broad, and directed the attention to the general subject of building and loan associations, and, in our judgment, was sufficient. *Morford v.*

Unger, 8 Iowa, 82; *Insurance Co. v. Highsmith*, 44 Iowa, 330; *Association v. Aschermann*, 108 Iowa, 150.

2 Again, the appellants claim that the enactment is expository legislation, and for that reason is unconstitutional. It will be conceded, we presume, that the powers of the judicial branch of the government are independent, and that the legislature cannot instruct the courts as to the construction to be placed on its enactments, or the construction to be given contracts. But we do not construe the section to mean anything of this nature, when read as a whole. It was intended as a curative act, and nothing more, and, while it says more than is really necessary to effect its purpose, we think it will not bear the construction contended for by appellants.

II. Appellants finally claim that, if the acts in question are valid, the plaintiff has not shown itself within the provisions of chapter 85 of the Acts of the Twenty-sixth General Assembly, because it did not put in evidence its amended articles of incorporation. This is purely
3 technical, and, we think, without merit. Plaintiff plead its corporate capacity under existing laws. There was a denial for want of information on the subject, and nothing more. This is not sufficient. *Stier v. City of Oskaloosa*, 41 Iowa, 353; *Sparks v. Association*, 100 Iowa, 458.

III. It is also contended that the plaintiff warranted that appellant's stock would mature within a certain time. If it be conceded for the purpose of this case that evidence along this line is competent, it is in conflict, and the appellant has not sustained his claim.

IV. The court allowed the plaintiff eight dollars
4 and eleven cents for taxes paid in May, 1898. This was not asked for in the petition, and hence should not have been allowed. With this deduction from the amount of the judgment, it is AFFIRMED.

MARY AUGUSTA McCARN, Appellee, v. MARTHA J. RUNDALL,
AND WILLIAM FOOS, Appellants. . .

Wills: MENTAL CAPACITY TO REVOKE: *Scope of general finding that will was invalid.* A general finding that a will, objected to on
1 the grounds of mental incapacity, undue influence, and fraud
2 and duress, was not a valid will, does not show that there was
lack of mental capacity, so as to invalidate revocation of a
prior will, destroyed on the same day that the second was executed.

REVOCATION: *Evidence of intent.* Intention to revoke a will is
shown by testimony of witness that testatrix called for it, and
3 wanted it destroyed and done away with, and that he tore it up
by her direction.

PROVING COPY: *Evidence.* A paper offered as a copy of a destroyed will is not satisfactorily proved by witness saying,
5 when it was read over to him on the trial, "That is right, as
near as I can recollect."

SUBSCRIBING WITNESSES: *Number required.* Code, section 3274,
4 requiring two witnesses to subscribe a will, is not satisfied by
one witness subscribing it and others being present.

Appeal from Jones District Court.—HON. H. M. REMLEY,
Judge.

WEDNESDAY, MAY 16, 1900.

THIS is an action in equity to probate a destroyed will.
trial to the court, and the will was admitted to
be defendants appeal.—*Reversed.*

n & Smyth for appellants.

Jarn for appellee.

IN, J.—Ella Foos departed this life September
On or about the seventeenth day of June, 1897,
an instrument in writing purporting to be her
the thirty-first day of July, 1897, this instrument

was destroyed by her direction, and the fragments thereof burned in her presence. On the same day, and as a part of the same transaction, a new will was executed by her. This last will was offered for probate after her death, and objections were made thereto on the grounds of mental incapacity, undue influence, and fraud and duress.

1 Upon the issue thus made there was a trial to a jury, which resulted in the general finding that the instrument offered was not the valid will of Ella Foos, and its probate was denied. After the termination of that trial, this action was brought in equity, setting up the facts as above stated, and a purported copy of the instrument of June 17, 1897, and praying that the same be admitted to probate as the last will and testament of Ella Foos. The defendants are the heirs of Ella Foos, and objected to the probate of the instrument of June 17th for the reasons following: *First*, because the will under which plaintiff claims was revoked, as provided by law; and, *second*, because the setting aside of the second will did not operate to revive the destroyed will. The plaintiff herein was named as a legatee in both wills. Section 3276 of the Code provides that "wills can only be revoked, in whole or in part, by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them." The plaintiff admits the destruction of the instrument executed June 17, 1897, but contends that said destruction did not work a revocation thereof, because it does not appear that such was the intention of the testator, and for the further reason that, the jury having found the second will invalid, the testator did not have the mental capacity to revoke the former will.

2 The fallacy of this position is apparent for two reasons: *First*, because the jury did not indicate in its verdict that it was based upon the lack of mental capacity in the testator, and there is no evidence before us tending even in the remotest degree to sustain such conclusion; and *second*, because the only witness who testified upon

the trial of this cause was called by the plaintiff, and upon his cross-examination testified that in his opinion Ella Foos was of sound mind when she directed him to destroy the

first will, "and intelligently and deliberately directed
3 him to destroy and do away with it." The witness

says: "She called for the June will, and wanted it destroyed and done away with; and I tore it up by her directions, and the pieces were put in the stove and burned."

This evidence clearly and unmistakably proves the intention of the testator to revoke the first will entirely, and that she had the mental capacity so to do. There is nothing in the record to indicate that its revocation was dependent upon the validity of the subsequent will, and, the revocation being complete under the statute, the will cannot be revived by parol. *Carey v. Baughn*, 36 Iowa, 540; 29 Am. & Eng. Enc. Law, 333; *Stewart v. Mulholland*, 88 Ky. 38 (10 S. W. Rep. 125, 21 Am. St. Rep. 320). There is, if possible,

a still stronger reason why the will of June 17, 1897,
4 should not have been admitted to probate. The stat-

ute requires that two witnesses must subscribe the will to make it valid. Code, section 3274; *In re Boyeus' Will*, 23 Iowa, 354. The evidence before us only shows that one witness signed the will. It is true the testimony shows that other witnesses were present, but this is not sufficient. It must be proven that the will was executed with the formality required by the statute. The testamentary right to dispose of property is regulated by the statute, which requires the will to be witnessed in a certain way, and we are

to presume that it was signed by others who when it was executed. And, as said *In re*
ate, 110 Cal. 387 (42 Pac. Rep. 815, 52 Am.
): "It is not for the courts to say that these
or any of them, are mere formalities, which
and without impairing the status of the instru-
not for courts to say that a mode of execution

or authentication other than that prescribed by law subserves the same purpose, and is equally efficient to
5 validate the instrument." Nor is the evidence satisfactory that the paper offered as a copy of the destroyed will is such. The only witness heard on that subject did not claim that he had ever read the will of June, 1897. He did not read the purported copy. When it was read over to him on the trial he said, "That is right, as near as I can recollect." The proof of the contents of a destroyed will ought to be of the clearest and most satisfactory character. 2 Greenleaf Evidence (15th ed.) p. 668; *Newell v. Homer*, 120 Mass. 277; *Dudley v. Wardner's Ex'rs*, 41 Vt. 59; *In re Johnson's Will*, 40 Conn. 587. This burden rested upon the plaintiff. *Newell v. Homer*, *supra*. She has failed to sustain it. See *Clark v. Turner*, 50 Neb. 290 (69 N. W. Rep. 843). Plaintiff's authorities on the question of revocation under undue influence are not in point, because there is no evidence upon which to base them. Even if it were proven that the subsequent will was the product of undue influence, it would not follow as a natural sequence that such influence inhered also in the revocation of the former will. The will of June 17, 1897, should not have been probated, and the judgment of the district court is REVERSED.

JOHN E. VENETT *et al.*, Appellants, v. J. G. JORDAN, Clerk.

Attendance of Jurors: CONTROL OF COURT OVER. Code 1873, section 233, providing that if, in the judgment of the court; the business does not require the attendance of all or a portion of the
2 trial jurors, such portion as the court deems proper may be discharged, does not prevent the court from merely excusing the jury from attendance for a stated period when their services are not needed.

COMPENSATION. Under Code 1873, section 3811, providing that jurors shall receive for each day's service or attendance in courts of

record two dollars, members of the regular panel of petit jurors cannot recover compensation for a definite period during which they are excused by the court from attendance.

Appeal from Polk District Court.—HON. T. F. STEVENSON,
Judge.

WEDNESDAY, MAY 16, 1900.

PLAINTIFFS were members of the regular panel of petit jurors duly summoned to appear at the April term, 1895, of the district court of Polk county. They appeared and served, and during the term were excused by the court for a period of fifteen days. On their final discharge the clerk refused to give them a certificate of service during the fifteen days, and this action is for a writ of mandamus to compel him so to do. The issue was raised by a demurrer to the petition, which was sustained, and from that ruling this appeal is taken.—*Affirmed.*

James Nugent for appellants.

No appearance for appellee.

WATERMAN, J.—We have to determine whether these jurors were entitled to compensation for the fifteen days during which they were excused from attendance upon the court. Section 3811, Code 1873, is the only provision relating to the compensation of jurors, and it is as follows: "Jurors shall receive the following fees: For each days' service or attendance in courts of record, two dollars. * * *"

paid when in actual service, or, if not called the time they are in attendance awaiting call. they are excused, as here, for a definite time, cannot be said during such period to be in attendance on the court. Their time is their own, and is then subject to the orders of the court.

Nothing is claimed for section 233, the terms of which are, "If, in the judgment of the court, the business of the court does not require the attendance of all or a por-

tion of the trial jurors, they or such portion as the court deems proper may be discharged. Should it afterwards appear that a jury is required, the court may direct them to be resummoned, or impanel a jury from the bystanders." We do not regard this section as exclusive, so as to forbid the court excusing the jury for a time when their services are not needed. But in any event, we do not see how its terms can avail these plaintiffs. If they were not excused, they were discharged, and their re-assembling was as though they had been again summoned. They were not in attendance on the court during the fifteen days, and therefore can have no compensation for that time.—AFFIRMED.

WREN HUDSON, Appellant, v. SMITH BROS., G. W. SMITH,
AND B. F. SMITH.

Appeal from Justice's Court: ATTORNEY AS BONDSMAN. An attorney in active practice is not competent to serve as surety on an appeal bond given on appeal from the judgment of a justice of the peace.

JURISDICTION. Since a person cannot be surety for himself, an appeal bond signed by a judgment defendant and an attorney in active practice on an appeal from a justice's judgment to the superior court is not sufficient to give the superior court jurisdiction.

Appeal: APPEALABLE ORDERS. An appeal lies from an order of the superior court overruling a motion to dismiss an appeal from a justice of the peace, because of the insufficiency of the appeal bond.

AMENDING ASSIGNMENT OF ERRORS: Dismissal. An appeal will not be dismissed because of the filing of an amended assignment of errors more than ten days before the trial term, where appellee has already argued all the points made in such amendment, and is not prejudiced thereby.

Appeal from Keokuk Superior Court.—HON. RICE H. BELL,
Judge.

111	411
115	150
111	411
133	749
133	750

WEDNESDAY, MAY 16, 1900.

ON January 8, 1898, judgment was entered in the justice court of William Wilson, Esq., against Smith Bros., George W. and B. F. Smith, for the sum of \$99 and costs. Three days later they filed an appeal bond in an adequate amount signed by "Smith Bros., Principal; John E. Craig, Surety; G. W. Smith, Surety,"—which was approved. Transcript was duly filed in the superior court of Keokuk, where the plaintiff moved that the appeal be dismissed, and the papers be stricken from the files, for that no sufficient appeal bond had been filed, one of the sureties being a defendant in the action, and the other an attorney in active practice. The motion was overruled, and plaintiff appeals. *Reversed.*

W. H. Morrison, Sawyer & Blood, and H. Scott Howell & Son for appellant.

F. M. Ballinger for appellees.

LADD, J.—In so far as Craig's signature as surety is concerned, *Bank v. Garretson*, 104 Iowa, 655, is decisive. He was an attorney in active practice, and the justice was not authorized to accept him as surety. The other
1 alleged surety was one of the judgment defendants. His signature added nothing to the strength of the bond. See *Clark v. Riddle*, 101 Iowa, 270. The statute contemplates security additional to what the party had by the judgment below. A person cannot be surety for himself. George W. Smith is not mentioned in the bond, and the mere writing of the word "surety" after his signature did not change his liability as one of the defendants. He was a defendant, and could only execute the bond as such. These views find direct support in *Croft. v. Bailey*, 1 Lea, 369;

McVey v. Heavenridge, 30 Ind. 100; *Labadie v. Dean*, 47 Tex. 90; *Barrow v. Clack*, 45 La. Ann. 478 (12 South. Rep. 631); 1 Enc. Pl. & Prac. 1002 *et seq.*

As there were no sureties, the bond was not such as contemplated by statute, and the superior court acquired no jurisdiction.

II. That the order overruling the motion was appealable appears from *Curran v. Coal Co.*, 63 Iowa, 94. Leave was asked to file an amended assignment of error, and the same was filed more than ten days before the trial term. Appellee had already argued all the points made, and was not prejudiced by the amendment. See *Stanley v. Barringer*, 74 Iowa, 34; *Hall v. Railway Co.*, 84 Iowa, 312; *Conner v. Long*, 63 Iowa, 295; *Buhlman v. Humphrey*, 86 Iowa, 600. The motion to dismiss the appeal is without merit.—REVERSED.

W. W. GARDNER V. ROACH & KECK.

Conversion of Mortgaged Chattels: ESTOPPEL. A mortgagee is not estopped to assert the mortgage against one purchasing the mortgaged chattels from the mortgagor, where the purchaser has suffered no damage.

Evidence: BURDEN OF PROOF. Plaintiff in an action for conversion of wheat on which he held a mortgage, having produced and given in evidence the notes and mortgage, and stated credits to which the mortgagor was entitled, defendant has the burden of proving payment.

CROSS-EXAMINATION. Where plaintiff in an action for conversion of wheat on which he held a mortgage had testified only as to the execution of the notes and mortgage, which he produced and offered in evidence, and as to the amount that should be credited thereon, there was no error in sustaining objection to questions asked him, on cross-examination, whether he sent anyone out to the farm while the mortgagor was threshing, or then made any attempt to collect the mortgage.

Instructions. An instruction being good as far as it goes, a party desiring more explicit ones should ask therefor.

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, MAY 16, 1900.

ACTION at law for the conversion of certain property on which plaintiff claims to hold a chattel mortgage. Defendants pleaded that they purchased the property without notice of plaintiff's mortgage, and also pleaded an estoppel, and payment of the mortgage indebtedness. There was a trial to a jury resulting in a verdict and judgment for plaintiff. Defendants appeal.—*Affirmed.*

E. C. Roach for appellants.

E. Y. Greenleaf for appellee.

DEEMER, J.—S. Dalrymple mortgaged his crop of wheat, oats, barley, corn, flax, millet, and hay grown during the year 1893 to plaintiff to secure two notes, one for one hundred and fifty dollars, and the other for fifty-nine dollars and forty-seven cents, each payable September 1, 1893. This mortgage was duly acknowledged and filed for record, and no question arises regarding the sufficiency of description, or that the records imparted notice. The grain was a farm belonging to one McDermott. In September, 1893, and after the maturity of the notes, defendants purchased four hundred and fifty-eight bushels from Dalrymple, that were covered by the mortgage. The action is to recover the value of the grain so purchased. The defendants pleaded payment of the mortgage indebtedness by Dalrymple, and also an estoppel. Plaintiff was examined as a witness in his own behalf. He testified to the execution of the notes and produced and offered them in evidence, and also

gave testimony as to the amount that should be credited thereon. On cross-examination he was asked if he sent any person out to the farm while Dalrymple was threshing, and also as to whether or not he made any attempt to collect his mortgage in the fall of 1893. The court sustained objections to these questions. In this there was no error. Manifestly, they were not proper cross-examination. At least, the court did not abuse its discretion in sustaining the objections.

II. On the issue of payment the court instructed that the burden was on defendant to prove the same. There was no error in this. Plaintiff produced the notes and mortgage at the trial, and they were introduced in evidence. He also gave certain credits to which the mortgage was entitled. Having thus made out a *prima facie* case, the burden was on defendant to prove their affirmative defense of payment.

III. A part of an instruction relating to estoppel is as follows: "And if you find from the evidence that the defendants purchased said mortgaged barley in open market upon the public streets, of said Dalrymple, mortgagor, without any actual knowledge of plaintiff's mortgage, that plaintiff at the time, with full knowledge that said Dalrymple was hauling said mortgaged barley, and selling it to the defendants, consented to, authorized, and permitted the said Dalrymple to haul and sell said grain to defendants without objection, knowing that Dalrymple was selling the same, and defendants purchased, and that plaintiff had such knowledge, and so consented before defendants paid said Dalrymple for said grain, and in no way notified defendants of his claim or lien, but with such knowledge stood by and permitted the sale and delivery of the grain and the payment of the purchase price to Dalrymple, then you will find that the plaintiff is estopped from claiming a lien under his mortgage against the defendants on account of said barley, and return a verdict for the defendants." Of this complaint is

made. It is said that, if a mortgagee knows that the mortgagor is disposing of mortgaged property, and, so knowing, permits him to sell without objection, he thereby waives his lien. Further, it is contended that the circumstances surrounding the sale of the grain were such that consent of plaintiff should have been inferred, or at least the case should

3 have been submitted to the jury on that theory. There is nothing in the instruction quoted that forbids consideration of these circumstances. The instruction is undoubtedly good as far as it goes, and, if defendants wished more explicit ones, they should have asked them. No doubt a mortgagee may by conduct allow the mortgagor to assume the credit of ownership, and by such conduct estop himself from asserting his mortgage, although not personally present when the sale is made. *Thompson v. Blanchard*, 4 N. Y. 303. But there is nothing in the instruction that runs counter to this proposition. *Wright v. E. M. Dickey Co.*, 83 Iowa, 464, involved a landlord's lien for rent, and it was there held that, as the landlord had, in effect, accepted the tenant's promise to pay the proceeds of the crops grown on the premises on the rent reserved, he could not assert his lien against an innocent purchaser. The case differs from this in that defendants had notice of plaintiff's lien, and plaintiff did not accept the promise of the mortgagor to pay the indebtedness from the proceeds of the mortgaged property. See *Blake v. Counselman*, 95 Iowa,

4 219. Aside from this, however, there is no evidence in the record that defendants have paid any one for the grain purchased by them. One of the essentials of an estoppel is that the party pleading it should have so acted with reference to the conduct or statements of the other as that he would suffer damage or injury if the other was permitted to deny the truth. Moreover, the grain that was sold with plaintiff's knowledge went to pay a landlord's lien thereon that was prior to plaintiff's mortgage, and plaintiff

was in no position to object to sales made to pay prior liens. The error, if any, in the instruction, was without prejudice. There being no prejudicial error, the judgment is AFFIRMED.

111	417
133	455

LOUISA BOEHLER, J. S. HARBER, *et al.*, v. CITY OF DES MOINES, IOWA.

Dedication: PLATS. Where a recorded plat shows a street running along the river, with lots lying between the street and the river, except for a short distance, where it shows a strip too narrow for lots, with only a dotted line between it and the street as elsewhere extended, such a strip is part of the street by dedication.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

WEDNESDAY, MAY 16, 1900.

PLAINTIFF, Louisa Boehler, began this action against the defendant to recover damages for trespass committed on certain real estate, and to enjoin further like acts. J. S. Harber and others intervened, claiming title to the property in question; and praying that it be quieted against plaintiff and defendant. The city, in its answer, also claims title to the property, and by cross bill seeks to have same quieted. The decree awards neither an injunction nor damages to plaintiff, nor does it quiet title in interveners, but it recites that the equities are with them and plaintiff, that plaintiff is in possession, and that the city has no right nor interest in the real estate, and its cross bill is dismissed. The city appeals.—*Reversed.*

J. Edward Mershon and *W. C. Strock* for appellant.

E. T. Morris for appellee Boehler.

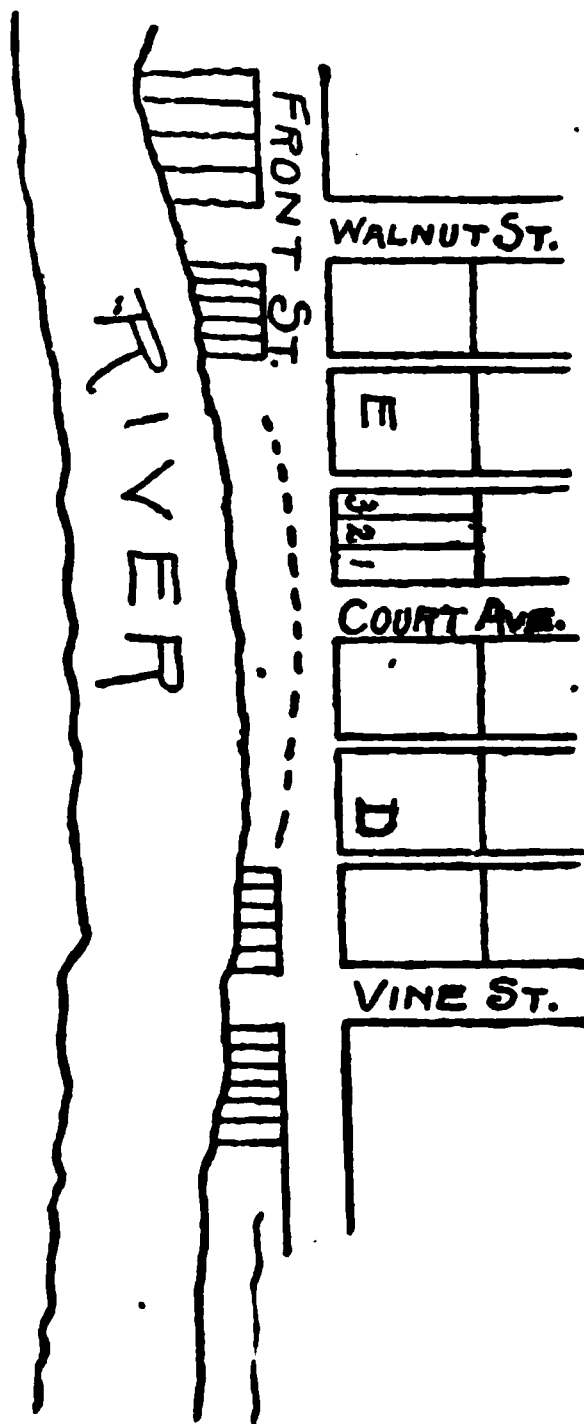
C. H. Sweeney for appellees Harber and others.

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WATERMAN, J.—The only matter to determine is as to the rights of defendant under its cross bill. The real estate in dispute, as described in plaintiff's petition, is a tract of ground one hundred and forty-eight feet north and south along the west side of East Front street in the city of Des Moines, and opposite to lots 1, 2, and 3, and to the alley adjoining said lots on the north in block E of Scott and Dean's addition to East Des Moines. In defendant's cross bill the description includes this tract, but extends it south opposite that part of block D, lying north of the south alley running east and west. The plat attached will show the tract. It lies west of Front street between the short lots shown, and mainly within or west of the dotted line. This dotted line appears on the recorded plat, and much force is claimed for it by defendant, as will be seen when we reach the testimony. The city bases its title upon a number of grounds; but two, however, are argued: *First*, it is claimed that this tract was dedicated to the city as a part of Front street when the addition was platted; *second*, that the city has had possession of it as a part of Front street for so many years that it has acquired title by prescription. John S. Dean was the original owner of this land, and made the plat in question. Louisa Boehler's interest was acquired in 1886 by quitclaim deeds from some of the heirs of Dean, then deceased, and intervener claims by representation the interest of another heir deceased. The tract remained unoccupied for many years after it was platted, which was in 1849, although the city used it for a dumping ground. In 1886 plaintiff leased to one De Witt the north sixty-six feet of the tract in dispute, and he went into possession. He and his assignee have since held it. This action was commenced in 1892. Plaintiff paid the general taxes on this property for the years 1889 to 1896, inclusive; but it appears the property was first placed on the tax list as omitted property at plaintiff's instance, and has since been carried along by the assessor in her name. A special tax for paving and curbing

was assessed against the city of Des Moines in 1892, and has been paid by it.

We come now to a consideration of the plat. An outline sketch of the part involved is herewith given:



It will be noted that Walnut and Vine streets are laid out as running to the river, while Court Avenue stops at the east line of Front street, and, so far as appears, the west line of Front street along this disputed tract is high-water mark. If it was the intention of the owner that this should be so, then the title of plaintiff and intervener is of no validity. Some witnesses testify on plaintiff's behalf that they had seen other plats about the time of the original survey, showing more lots on the west of Front street than are here shown; that is, that short lots were platted south of those shown next to Walnut street down as far as the second alley

in block E. This evidence we cannot consider. There is also evidence that Dean tried to sell the tract in dispute at different times after the plat was recorded. This is a fact of but little weight. After all, we must rely chiefly on the plat, and that shows the street at this point is bounded by the river on the west. We are not authorized to add a line to the plat which was not placed there when the original survey was made, nor to take any such from it, unless, perhaps, when there is a conflict in the boundaries, or, in some cases, when the plat is shown to be not in accord with the original survey, as in *Bradstreet v. Dunham*, 65 Iowa, 248. See, on the general proposition stated, *Chicago, R. I. & P. R. Co. v. City of Council Bluffs*, 109 Iowa, 424. In addition to the evidence of the plat itself, we have the testimony of the surveyor who made it. He says, speaking first of the dotted line: "That is a depression between that and the river. It might have been a flat and might have been a second bank there. I don't know about that. My impression is we run the line as near the bank of the river as we could, so as to get the street all out of the river, and then made lots where there was enough of land between the street and the river. All that there is left is public property, is my impression; but, of course, I don't recollect whether there was anything said about that or not. We calculated about that time that we were going to have considerable water, and the steamboat would have to land some place. We were instructed to lay off lots wherever there was room along there. But where there was no room to plat lots we left the street extending to the river. That is my idea of it.

That fringed line was the second bank, I think. calculation to lay off lots along the river bank ere was room enough. That was what I was o. Ques. 'I will ask you to examine the map * * and state whether or not you under- he lowland along the bank of the river come ie north end of the fringed line?' Ans. Well, I

have my doubts whether that is a correct map of the river there. There were little depressions and caved-in places, and we calculated to miss them all. Of course, there was some little bank left. You know how the streams are. There was some bank, more than enough for the street, and we had to miss the caved-in places. The fringed line does not indicate the caved-in places; that is only a ridge of land." One contention of the city—that the dotted or fringed line indicated ordinary high-water mark—we do not find sustained; but both the plat and this witness, who made it, show that from a point opposite the first alley north of Vine street to a point opposite the second alley north of Court avenue the land to the river bank was given as a street, so that a boat landing might be made. It is true that where a plat is made with a street running parallel with a navigable river, and a narrow strip of land between such street and the river, it will not be presumed that this strip is dedicated to public use. *Cowles v. Gray*, 14 Iowa, 1. But that case is not applicable here, for the plat, instead of showing the land in dispute outside the street boundary, shows it to be within. The right of the public to this street as shown on the plat accrued on the acknowledgment and recording of that instrument, and the possession of plaintiff, if it be admitted to be of a character that might in time divest public rights, has not been sufficiently long continued. *Lathrop v. Railroad Co.*, 69 Iowa, 105; *Davis v. Huebner*, 45 Iowa, 574. We are convinced the defendant should have had a decree quieting title in it for the use of the public.—REVERSED.

JOHNSON COUNTY, IOWA, v. ARTHUR STRATTON AND JAMES
STRATTON, Appellants.

111	421
137	335

Support of the Poor: LIABILITY OF RELATIVES. Under Code, section 2217, placing the liability to support a poor person on his grandfather, "in the absence or inability of nearer relatives," it is not enough to show that certain poor persons have no children;

that their mother has not the ability to support them; that their father "has abandoned his wife," and has not property subject to execution; but it must be shown that he is absent or unable to support the children.

Appeal from Johnson District Court.—HON. M. J. WADE,
Judge.

WEDNESDAY, MAY 16, 1900.

THE demurrer of defendant James Stratton to plaintiff's petition and amendment was overruled, and said defendant electing to stand on his demurrer, judgment was rendered against him, from which he appeals.—*Reversed.*

O. A. Byington, Remley, Ney & Remley, J. G. Marner and L. A. Foster for appellant.

No appearance for appellee.

GIVEN, J.—I. The petition and amendments show the following: That Arthur Stratton is the son of appellant, the husband of Carrie Stratton, and the father of their two children, aged about two and four years, and that he has abandoned his wife, and has no property subject to execution; that said Carrie Stratton has no means or property whatever; and that upon her application to the trustees of Oxford township for support of said children, and upon the trustees finding that said children were poor persons, and not able to maintain themselves, support was granted and extended to the amount of two hundred dollars; that James Stratton, the grandfather of said children, is the owner of property of the value of fifty thousand dollars or more, and is able, without personal labor, to support said children. Plaintiff asks that James Stratton be adjudged to support said children, and for judgment against him for said two hundred dollars. The ground of demurrer is that the petition fails to show that there is such an absence or inability of near relatives as contemplated in the statute. The Code provides as follows:

"Sec. 2216. Who Liable to Maintain. The father, mother and children of any poor person, who is unable to maintain himself or herself by labor, shall jointly or severally relieve or maintain such person in such manner as, upon application to the township trustees of the township where such person has a residence or may be, they may direct.

"Sec. 2217. In the absence or inability of nearer relatives, the same liability shall extend to grandparents, if of ability without personal labor, and to the male grandchildren who are of ability by personal labor or otherwise."

The obligation to support these children is primarily upon their father and mother, and secondarily upon their grandfather, "in the absence or inability of nearer relatives." The ages of the children show that they could not have had children. Therefore their grandfather was their next nearest relative to their father and mother, and bound for their support, if the conditions provided in the statute exist. The petition shows that the children are poor persons who are unable to maintain themselves; that their mother has not the ability to support them and the grandfather has the ability to so do without personal labor. The only showing as to their father is that he "has abandoned his wife," and "has no property in this country, or in any other country, subject to execution." It is not alleged that he is absent or unable to provide for his children. It does not follow that he is absent because he has abandoned his wife, nor that he is unable to support the children because he has no property subject to execution. Plaintiff is pursuing an exclusively statutory remedy, and must allege every condition necessary to entitle it to the relief demanded. This it has not done. Therefore the demurrer should have been sustained.—REVERSED.

D. SACHS & SONS V. GEO. W. GARNER, Appellant.

Intoxicating Liquors: SALE BY NON-RESIDENT: Iowa contracts. Where the traveling salesman of one who deals in intoxicating liquors in another state, his authority being limited to take orders subject to the approval of his employer, receives an oral order for whisky to be shipped from such other state, and paid for by the vendee by giving the price to the salesman, or by remittance to the vendor, the contract, not being completed until accepted by the vendor, there is no contract made in this state, and in contravention of the laws of this state against the traffic in intoxicating liquors, although the purchaser was not aware of the limitation on the salesman's authority, no attempt being made to mislead him in this regard.

Appeal from Harrison District Court.—HON. WILLIAM HUTCHINSON, Judge.

THURSDAY, MAY 17, 1900.

ACTION in equity for two hundred and ten dollars and seventy-nine cents on account of whisky sold in 1897, and to subject certain notes deposited as collateral security to the payment thereof. The answer averred these sales to have been made in Iowa, and in contravention of its laws; and in a counterclaim filed the defendant asked judgment for four hundred and ten dollars and sixty-three cents pre-laintiff for whisky. Decree for the plaintiff dismissing the counterclaim. The defendant *med.*

7 for appellant.

bran for appellee.

—It appears that oral orders were given by for whisky to be shipped by the plaintiff from ., to Persia, Iowa; the freight to be paid by

him in the first instance, and subsequently deducted from the purchase price to be handed to plaintiff's traveling salesman; or remitted to the house according to his choice. The salesman taking these orders sent written memoranda thereof noting time of shipment, and on some of them were stamped the words, "This sale is not complete until approved by D. Sachs & Sons." This is not important, however, for the reason that the authority of the salesman was limited to taking orders subject to such approval. No inquiry was made by the defendant concerning his powers. No part of the price was paid, nor any of the goods delivered, when the orders were taken, and he knew from whence the whisky was to come. The salesman did nothing calculated to mislead him into the belief that the sales were completed; nor was the character of the transaction such as to indicate apparent authority on his part to make a sale, rather than to receive orders for goods subject to the approval of his principal. Had the plaintiff refused to ship, no one would say, under these circumstances, that a cause of action accrued in favor of defendant. Why? Because the salesman had no authority, actual or apparent, to sell, and hence there was no sale until the plaintiff accepted the orders by delivery or otherwise. As the agent did not undertake to do more than take orders, and the defendant was not misled into believing a sale was intended, these cannot be treated as contracts until accepted. As said by Cole, J., speaking for the court, in *Tegler v. Shipman*, 33 Iowa, 198: "To take an order for liquors is one thing, and to agree to accept the order, and to fill it, is quite another; the former is a proposition, while the latter is the consummation of a contract." The orders were not accepted until they reached Kentucky, and for this reason that was the place of the contract. *Whitlock v. Workman*, 15 Iowa, 351; *Engs v. Priest*, 65 Iowa, 232; *Wind v. Iler*, 93 Iowa, 316; *Gross v. Feehan*, 110 Iowa, 163; *Tegler v. Shipman*, *supra*.—AFFIRMED.

H. E. BARNES, Appellee, v. MARY E. RAWSON, NELLIE RAWSON, LAURA RAWSON, J. M. ST. JOHN, Guardian, AND ANNA E. WOODBURY, Appellants, CRAM & MILLER, Appellees.

Contracts: STIPULATION AS TO ACCEPTANCE: *Right of action.* Under a contract to sink a well of sufficient depth to insure an ample supply of water for four hundred head of stock, its sufficiency to be tested by "the continual pumping of water for seventy-two hours," and providing for payment of the stipulated price by the parties upon their acceptance of the well, "as being satisfactory to them," an action for services in sinking the well cannot be maintained until the test provided for has been made, or waived, and the well accepted.

Appeal from Sioux District Court.—HON. G. W. WAKEFIELD, Judge.

THURSDAY, MAY 17, 1900.

ACTION in equity to foreclose a mechanic's lien for a well. Decree for the plaintiff. The defendants Rawson and St. John, guardian, appeal.—*Reversed.*

G. W. Pitts and St. John & Stevenson and T. F. Stevenson for appellants.

No appearance for appellee.

SHERWIN, J.—In June, 1891, the defendants Rawson entered into a written contract with Cram & Miller, by the terms of which Cram & Miller agreed to put a well down on the defendants' premises, of sufficient depth to insure an ample supply of water for four hundred head of stock. The contract provided that the well should be tested by "the continual pumping of water for seventy-two hours; the volume of supply to be maintained throughout the test, with pump running at full capacity." The contract further provided that defendants should pay the stipulated price "upon accept-

ing the well as being satisfactory to them," and that, if there was a failure to obtain a sufficient supply of water, nothing was to be paid for the well. The plaintiff herein bored the well under a contract with Cram & Miller, and sues to recover for such service. There are several reasons why he cannot maintain his action, but we need not mention them all. It must be conceded that the plaintiff's cause of action against the defendants must be based upon the defendants' contract with Cram & Miller, and, if the defendants are not liable under that contract, plaintiff cannot recover. The test of the well provided for in the contract was never made, nor was it waived by the defendants. The contract guaranteed sufficient water for four hundred head of stock, and the test was one of the means provided for to determine the supply the well would furnish. Until the test was made, the defendants were not bound to accept the well, and no action could be maintained upon the contract. *Wiseman v. Thompson*, 94 Iowa, 607; *Jackson v. Creswell*, 94 Iowa, 713. Again, the defendants never accepted the well, but, on the contrary, insisted that the required test be made, and contended that the well would not supply the amount of water guaranteed; and the evidence wholly fails to prove that the well would at any time furnish such supply. The judgment should have been for the appellants, and the case is, as to them, REVERSED.

S. J. RICHARDSON V. CITY OF WEBSTER, City, Appellant.

Cutting Down Street: RESPONSIBILITY FOR DAMAGE: *Cities*. Where, as a result of cutting down a street on which no grade had been established, the abutting property is made more difficult of access, a retaining wall is rendered necessary, and shade trees standing in the street are injured or destroyed, the injury is such as to entitle the property owner to recover damages of the city.

111	427
113	221
113	222
113	475

111	427
114	74

111	427
115	512

111	427
117	632

111	427
120	439
120	558

111	427
127	422

111	427
130	575

111	427
136	158
136	439
136	441

PRIMA FACIE EVIDENCE OF LIABILITY. Evidence that work in cutting down a street was done by the city street commissioner, that it extended over a period of six weeks, and that the city disposed of some of the dirt, is sufficient to make a *prima facie* case against the city, as the party responsible for the injury caused to the abutting property by such work.

MEASURE OF DAMAGES. In an action for injuries to abutting property resulting from cutting down a street on which no grade had been established, and where no part of plaintiff's property is taken, the measure of damages is the difference between what the property was fairly worth on the market before the work was done, and what it was so worth thereafter.

EVIDENCE OF VALUE: Conclusions. In an action against a city for damages to abutting property from cutting down a street, it is not competent to ask a witness as to what, in his opinion, is the difference in the value of the plaintiff's property at the time of trial and immediately before the cutting was done, or as to how much less is the value of the premises in question since the cut was made than it was before, as such questions call for the conclusions of the witness.

COMPETENCY. The question as to whether plaintiff's property is any better than lots owned by a witness on another corner of the same street, or as to what lots had been sold for in the part of town where plaintiff's property is situated, is not competent for the purpose of showing what other property in the vicinity of that of the plaintiff has sold for; assuming that to have been the purpose.

Appeal: ESTOPPEL. An appellant is not precluded from taking advantage of exceptions taken to incompetent testimony, although he has introduced similar testimony in his own behalf.

Hamilton District Court.—HON. B. P. BIRD-SALL, Judge.

THURSDAY, MAY 17, 1900.

Plaintiff is the owner of a tract of real estate in de-which abuts, one side upon division street, and on Funk street. On this property is a house, and other improvements, in the way of shrubbery. There are trees, also, in front of the property, on both sides outside the sidewalk line. No grade had been laid on either of these streets. In the fall of 1897 the

defendant city—as claimed, without any ordinance, resolution, or vote authorizing it so to do—cut down and excavated both of said streets along the line of plaintiff's property to such a depth as to make a retaining wall necessary, making access to said property difficult, and destroying said trees. Damages in the sum of fifteen hundred dollars are asked. The defense was a general denial. Trial to jury. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed*.

J. H. Richard and Wesley Martin for appellant.

D. C. Chase for appellee.

WATERMAN, J.—We may concede the claim of appellant that, although the act of defendant was wrongful, plaintiff cannot complain of it unless she was injured thereby. But we think there is evidence of some injury. It is
1 thought, however, the injury was not of such a character as to entitle plaintiff to damages. This point we regard as determined against defendant by the cases of *Trustees v. City of Anamosa*, 76 Iowa, 538, and *Blanden v. City of Ft. Dodge*, 102 Iowa, 441. It is alleged here that plaintiff's property was made more difficult of access, that a retaining wall was rendered necessary, and that certain of the shade trees, in the street, but not obstructing travel, were
2 injured or destroyed. Surely these are all elements of damage. It is also urged on the part of appellant that there is no showing that the city did the work complained of, or was in any way responsible therefor. It was in evidence that the work was done by the street commissioner, that it extended over a period of about six weeks, and that the city disposed of some of the dirt taken from the excavation. This made a *prima facie* case against the city, and no evidence was offered to rebut it.

II. On the matter of damage, certain questions were asked of plaintiff's witnesses, to which proper objections were

made,—as, for instance, of the witness Richardson: “I will ask you to state how much less in value the premises
 3 there are worth since this cut was made than they were before the cut was made.” Of the witness Root: “I will ask what, in your opinion, is the difference in value between the property as it now is, and just immediately before the cutting was done.” Other witnesses were asked similar questions. While the measure of damages, doubtless, is the difference between what the property was worth before and after the work was done, as we shall attempt later to show, these questions call, not for facts, but mere conclusions. The witness Root, for instance, testified that he could not give the value of the property before or after the injury, yet, in response to the interrogatory we have set out, he answered that its depreciation would be one thousand dollars. In the form asked, these questions called for an expression of opinion by the witnesses as to the amount of damages suffered by plaintiff. This was having the witness usurp the province of the jury, and therefore improper. *Russell v. City of Burlington*, 30 Iowa, 262. In *Renwick v. Railroad Co.*, 49 Iowa, 674, which was an action for damages because of a right of way taken through property for a railway, a witness was asked a question almost identical with those objected to here, viz.: “Tell the jury what was the difference in value of this property before and after the railroad was built.” This court held it improper, and the holding is cited with approval in *Hendley v. Railway Co.*, 85 Iowa, 455-467. The ruling
 as was doubtless induced by the thought that a
 ight understand a question so framed as calling for
 te of the damage done; and such was the under-
 nding of the witness Root in the case at bar; for he
 ew nothing of the value of the property. It is
 d by counsel for plaintiff that similar questions
 d by defendant of its witness. This does not pre-
 m taking advantage of the exceptions it has pre-

III. The city offered testimony that was rejected, and which, it is claimed, tended to show the prices at which other lots had been sold in the vicinity. We do not think the questions ruled out indicate that the purpose was to
5 show this. A witness said that he had owned lots on another corner of these streets some years before. He was asked: "Is the location of one any better than the other, so as to affect the value? If so, what?" The question was ruled out, and nothing further on this line asked. Another witness said he knew of sales of lots in the part of town where plaintiff's property is situated. He was then asked: "What lots were those you testify about being sold?" The exception is taken upon the ruling sustaining an objection to this question. What the ultimate purpose of the examiner was, we have no means of knowing. Standing alone, the question was improper. The matter discussed, viz: that defendant had a right to show what other like property in the vicinity sold for, is not shown by the record to have been presented.

IV. The court gave the jury, as the measure of damages, the difference between what the property was fairly worth in the market before the work was done and what it was worth thereafter. Defendant's contention is that this rule applies only when the act complained of takes a part or
6 effects a physical change of the realty. Without attempting to distinguish the cases cited, it is enough to say that the rule announced by the trial court is fully sustained in *Finley v. Hershey*, 41 Iowa, 389. We do not understand why the acts here charged are not the same, in legal effect, so far as the measure of damages is concerned, as an unlawful change of grade, as in *Noyes v. Mason City*, 53 Iowa, 418. The damages in such a case would be measured according to the rule given the jury by the trial court. *Dalzell v. City of Davenport*, 12 Iowa, 437; *Hemstead v. City of Des Moines*, 52 Iowa, 305; *Stewart v. City of Council Bluffs*, 84 Iowa, 61. For the reasons given in the second division of this opinion, the judgment will be REVERSED.

GERMAN SAVINGS BANK V. BATES ADDITION IMPROVEMENT
COMPANY AND FREDERICK FIELD, Appellants.

Notes: SATISFACTION BY RENEWAL: *Jury question.* A company gave a note guaranteed by F. by an indorsement thereon. At maturity thereof the company, in consideration of the same indebtedness, gave the bank another note for the same amount, paying interest in advance. It was agreed at this time between the bank and company that the bank should retain the original

1 note till the renewal note was indorsed as the original, but it does not appear that the subject was again mentioned, though on maturity of the renewal note another note was given, and interest paid in advance, and so on, until maturity of the last note given, and till nine or ten renewal notes were given, the original note being retained without any endorsement of satisfaction. It does not appear that F. knew of the renewal notes, or was called on to endorse them. *Held*, that it was a question for the jury whether, in taking the later renewal notes, the parties acted on the agreement, or abandoned it, and extended the credit, as evidenced by the renewal notes, to the company alone.

Directed Verdict: WAIVER OF SUBMISSION TO JURY. Though both

2 parties move for a verdict, neither, as against the motion of the other, waives the right of submission to a jury.

from Polk District Court.—HON. C. P. HOLMES,
Judge.

THURSDAY, MAY 17, 1900.

receiver of the plaintiff bank asks judgment on a
y note for three hundred and fifty-one dollars and
cents, dated September 26, 1893, due ninety days
executed by the defendant company to the plaintiff
indorsed by defendant Field and five others, guar-
payment at maturity. The defendant Field an-
mitting the execution and guaranteeing of said
ving that the same is a valid claim against him,

111 432
1113 435

111 432
121 150

111 432
137 214

and alleging that the same has been fully paid by the taking of other notes in settlement thereof; also alleging that the bank, without his knowledge or consent, extended the time of payment, wherefore he says his liability ceased. The defendant company answered, admitting its corporate capacity, and denying every other allegation in the petition. At the close of the evidence the defendant Field moved for a verdict, which was overruled, and thereupon the plaintiff moved for a verdict, which was sustained, and verdict and judgment rendered accordingly. The defendant Frederick Field appeals.—*Reversed*.

Connor & Weaver for appellant.

Dowell & Parrish for appellee.

GIVEN, J.—I. The note in suit was executed by “Bates Addition Improvement Company, by Frederick Field, Pres., by B. F. Holcomb, Sec.,” and guaranteed by Frederick Field and five others by an indorsement thereon. At the maturity of this note, to-wit, December 30, 1893, the defendant company, in consideration of that indebtedness, executed to plaintiff its promissory note for three hundred and fifty-one dollars and forty-five cents, due at a future date, and the defendant company paid the interest thereon in advance to maturity. Thereafter new notes of the defendant company were taken on account of this indebtedness, and interest paid in like manner on the maturity of the last note executed; the last of the series being dated November 2, 1896, and due four months after date. It appears to have been agreed between the bank and the company, when the first of this series of renewal notes was given, that the bank should retain the original note until the renewal note was indorsed as the original was, but it does not appear that this subject was ever afterwards mentioned at the time any of the other eight or nine renewal notes that followed were executed. Each of

these renewal notes except the two last, was surrendered when renewed, but the original note has remained continuously in the possession of the bank, and has never been canceled or surrendered. The defendant Field executed the original note as president, but it does not appear by whom the renewal notes, except the two last, were executed, and they are not by Mr. Field. Mr. Field testifies that he was abroad from January to July, 1894, and that he sold his stock in the defendant company April, 1895. There is no evidence that he was ever called upon to indorse any of these renewal notes, nor that he consented to or had any knowledge of their execution. Others acted for the defendant company in giving these renewal notes.

II. The only question presented in this case is whether the original note was satisfied by the execution and delivery of any or all of the renewal notes. If it was satisfied there

was no extension of the time for its payment, and
1 if it was not satisfied plaintiff could have sued upon it at any time after its maturity, and in that case there was no extension of time. If all or any of the renewal notes were received by the plaintiff in the place of, and in satisfaction of, the note in suit, then it was satisfied; but if the renewal notes were received under an agreement that they were not to stand in lieu of the first until indorsed as it was indorsed, and that the first was to be in force until that was done, then there was no satisfaction of the note in suit. The evidence is undisputed that such was the agreement when the first renewal was given, but, as we have seen, the matter of the
ment was never afterwards mentioned, and it may well
stioned whether in giving and taking the later renewal
the parties acted upon the agreement or whether they
med it. On the one hand, we have the fact that the
ff continued to hold the note in suit without any in-
tent of satisfaction thereon, as tending to show that it
upon the agreement. On the other hand, we have the
at it continued to receive these renewal notes to the

number of nine or ten, and interest up to November 2, 1896, more than three years after the note in suit became due, without demanding payment or indorsement, as tending to show that both parties thereto abandoned said agreement, and that the credit, as evidenced by the renewal notes, was extended to the defendant company alone. The pivotal question in the case is whether the renewal notes were all given under said agreement, or whether in giving the later notes the agreement had been abandoned. There are other facts than those we have mentioned bearing upon the question. Though there is no conflict in the evidence, the conclusion to be drawn therefrom is one about which minds may differ. Therefore it cannot be said as a matter of law which is the correct conclusion. We think that question should have been submitted to the jury, and that the court erred in sustaining plaintiff's motion for a verdict.

III. At the close of all the evidence the defendant moved for a verdict, which motion was overruled; whereupon the plaintiff moved for a verdict, which was sustained. Plaintiff contends, as was contended in *Bank v. Milling Co.*, 103 Iowa, 524, that, as each party moved for a verdict, each waived the right of submission to the jury. We said in that case: "This seems to be the rule established by the weight of authority,"—citing 6 Enc. Pl. & Prac. 703. Holding that there was not sufficient evidence to justify the court in directing a verdict for the defendant, we expressed no opinion upon the question thus presented. The authority referred to is cited by the plaintiff, and is as follows: "Where, at the close of the evidence, on a jury trial, both parties ask for the direction of a verdict, it will be assumed that they intend to waive the right of submission to the jury, and let the court decide the question involved, both of law and fact, unless the party whose request is refused asks to go to the jury upon the questions of fact." A number of cases, mostly from New York, are cited in the foot-notes as supporting this statement of the rule. This

court has never passed upon the question of application of this rule in our state, and we understand that the practice with us has been different. In *Calden v. Crowley*, 74 Wis. 157, wherein the question was raised, but not passed upon, the court said "that it would be slow to hold that a party thereby waived his right to have the questions of fact passed upon by the jury," and we concur in that expression. Relying upon the law as announced in *Meyer v. Houck*, 85 Iowa, 319, as to when the court may direct a verdict, each party made his motion. By his motion the defendant asked for a verdict upon the claim that the evidence would not support a verdict for the plaintiff, and this the plaintiff denied. Plaintiff's attitude as against defendant's motion was that of insisting that there was evidence to support a verdict in his favor. After the court ruled with him, holding, not that plaintiff was entitled to a verdict, but that there was evidence to support such a verdict if the jury should so find, plaintiff moved for a verdict. The attitude of the defendant towards that motion was that there was not evidence to support a verdict for the plaintiff. The parties never agreed to waive a jury, and to submit the issue of fact to the court, and we think it should not be assumed that they so intended. They differ radically as to the proper conclusion to be arrived at from the evidence as to whether all the renewal notes were given under the agreement that the one in suit was to remain as evidence of the debt,—a matter, as we have said, about which minds may differ. Neither was willing, as against the motion of the other, to waive a jury, and submit this difference to the court, but each was impliedly asking, as against the other, that this difference, which it was the province of the jury to determine, should be submitted to the

∴ —REVERSED.

T. J. CONNORS v. E. J. CHINGREN, Defendant, AND GEORGE
E. HUGHES, Defendant and Appellant.

Fraudulent Real Estate Exchange: SUFFICIENCY OF EVIDENCE. Defendant H. deeded real estate of the value of four hundred dollars to the wife of defendant C., the deed reciting a consideration of two thousand dollars. The actual consideration, if any
1 was given, was her note for one thousand dollars. The land was marshy and unfit for cultivation. Afterwards C. traded the land to plaintiff for a stock of goods at a valuation of two
7 thousand dollars, after having shown him a different tract of land, which was worth such amount, which he represented as
14 the land he was trading. H. took a chattel mortgage on the stock for one thousand dollars, and released his claim on the land, and afterwards purchased goods for such stock, and moved the stock to another town, and thereafter sold it under his mortgage. There was conflicting testimony of statements made by C. concerning the interest of H. in the property. *Held*, sufficient to sustain judgment against both defendants in an action for damages for fraud in such transaction.

Evidence: ADMISSIBILITY: *Against one of two defendants.* Where two defendants are sued for complicity in a fraudulent real
6 estate trade, evidence of what one of the defendants said and did previous to the trade is admissible against him.

SAME. Where, in an action for fraud in a real estate trade, defendant introduces evidence that the stock of goods received in
13 exchange was greatly overvalued, plaintiff may show that defendant's agent sold the goods at very low prices, as showing a desire to speedily dispose of the goods, and other matters in issue.

SAME. Where, in an action against two defendants for fraud in a
13 real estate trade, one of the defendants claims to have had no interest in the trade, except as mortgagee, a deed of the property from him to the wife of the other, and a mortgage back, are admissible.

SAME: *Impeachment.* Where two defendants are sued for complicity in a fraudulent real estate trade, and one of the defendants
8 testifies that he did not state to a certain person that the other defendant owned the property received in the trade, testimony that he did make such statement is admissible for impeachment.

OBJECTIONS. Error in the admission of evidence of statements made by one defendant in an action charging complicity of two defendants in a fraudulent real estate trade will not be considered when the record does not show an objection on grounds applicable thereto.

Instructions; MUST NOT ASSUME DISPUTED FACTS. Where, in an action charging a mortgagee of a stock of goods with complicity in a fraud by which the mortgagor obtained the goods, the evidence showed that the mortgagee purchased additions to the stock, and had the stock moved to another town, and the court had instructed that, if the past transactions were in good faith, the mortgagee had the right to remove the goods, it was not error to refuse to instruct that, as mortgagee, he had the right to order new goods and to remove the stock, as such instruction assumed the validity of former transactions between the mortgagor and mortgagee, the good faith of which was in dispute.

EQUIVALENTS. It is not error to refuse to instruct that fraud is not presumed, and that, if the evidence is consistent with fair dealing, the jury should so find, where an instruction is given that, where the evidence is as consistent with an honest purpose as a fraudulent one, the verdict should be for the person charged therewith.

IMPEACHMENT: *Must be requested.* Where there was no instruction asked limiting the effect of impeaching evidence, the failure to give such instruction was not error.

SAME: Conspiracy. Where two defendants are sued for complicity in a fraudulent real estate trade, an instruction that, if a conspiracy to defraud is established, then the declaration of either defendant in carrying out the common purpose, is binding on the other, is a sufficient limitation of such evidence, in the absence of a request for a more specific instruction.

Measure of damages. Where the pleading in an action for a fraudulent real estate trade shows that the parties agreed on the basis that the land was of a certain value, and that the measure of damages was the difference between the actual value of the land received and the value as represented, such instruction is not erroneous, in the absence of a request for a specific instruction, for failure to recognize the actual value fixed by the parties to the trade.

REASON AND PREJUDICE. Where the amount of the recovery is stated by the instructions, it cannot be said, from the verdict alone, that it is the result of passion or

EXCESSIVE VERDICT: *Reduction by court.* Where, in an action for damages for fraud in a real estate trade, certain property was taken for two thousand dollars, when it was only worth four hundred dollars, it was not error for the court to reduce an excessive verdict for plaintiff, and enter judgment for one thousand six hundred dollars damages and ninety dollars accrued interest.

Appeal from Pocahontas District Court.—HON. LOT THOMAS, Judge.

THURSDAY, MAY 17, 1900.

ACTION at law to recover damages for an alleged conspiracy to defraud. There was a trial to a jury, resulting in a verdict for plaintiff. Defendant Hughes appeals.—*Affirmed.*

Wright & Nugent and Stevenson & Lavender for appellant.

W. C. Ralston for defendant Chingren.

J. A. O. Yeoman and Botsford, Healy & Healy for appellee.

DEEMER, J.—Defendant Chingren was a real-estate agent residing in Fonda, and using an office rented from his co-defendant, Hughes. Hughes owned some land in section 8, in Cedar township, Pocahontas county, known as 1 “Sunk Grove.” On the eighth day of August, Hughes conveyed this land, by special warranty deed, to Chingren’s wife, the expressed consideration being two thousand dollars. The real purchase price, if there was any, was four promissory notes executed by Mrs. Chingren for the sum of one thousand dollars. The character and value of the land are in dispute; but the jury was authorized to find that it was marshy, and entirely unfit for cultivation; that it could not be drained, and was not worth to exceed four hundred dollars. Learning that plaintiff had a stock of goods

and a store building at Barnum for sale or trade, Chingren arranged by telephone for plaintiff and a real-estate agent named Wickens, who had plaintiff's property for sale or trade, to go to Fonda to see the land. Pursuant to arrangement, the three parties named went to see the land. Plaintiff contends that, instead of being shown the marshy land theretofore owned by Hughes, he was pointed out another and different piece, that was high and dry, and without swamp or marsh, save about eight acres in the southwest corner. Returning from the land, the parties then went to view plaintiff's property at Barnum. Chingren represented to plaintiff that Hughes held a mortgage for one thousand dollars on the land, and that, before a trade could be consummated, he would have to see whether Hughes would consent to a change of securities. It was therefore orally agreed between the parties that, if Hughes would consent to this exchange, they would trade on the following terms: The land was to be taken by plaintiff at two thousand dollars, and he was to receive for his stock of goods one thousand two hundred dollars, and for his lot and store building one thousand dollars. The difference of two hundred dollars was to be represented by a note secured by a second mortgage on the store building. Chingren was to go back to Fonda and get Hughes to examine plaintiff's property. Pursuant to arrangements, Hughes went to Barnum and looked over plaintiff's property, and consented to a change of securities. Thereafter Hughes surrendered to Mrs. Chingren the one thousand dollars in notes secured from her, and accepted a new note for the same amount, which was executed by Mrs. Chingren to Hughes, secured by first mortgage on the stock of goods and the store building and lot. Mrs. Chingren conveyed to plaintiff the land deeded her by Hughes; and plaintiff, by bill of sale, conveyed his stock of goods, and by warranty deed his store building and lot, to Mrs. Chingren. Mrs. Chingren also executed and delivered to plaintiff a note for two hundred dollars, secured

by second mortgage on the store building and lot. Chingren took possession of the stock, and at his request Hughes sent a man to take charge of the store,—as he says, for a few days, during his (Chingren's) absence. This man (Burdick, by name) sold some of the stock, and the net amount of the sales was credited on Hughes' note. On Burdick's return, Chingren again took possession of the stock, and sold goods for about two months, when Hughes took possession, and had it shipped to Fonda in his own name. After it arrived at Fonda, Hughes sold at retail until his notes from Mrs. Chingren matured, and he then foreclosed his mortgage by selling the remainder, and he claims that the total amount received has not been sufficient to satisfy the note. About two months after the exchange, plaintiff again visited the land he supposed he was getting in exchange, and then for the first time found that the wrong piece had been shown him, and that he had been defrauded. Chingren was then indicted for securing property by false pretenses, convicted, and sentenced to the penitentiary. He appealed to this court, and the judgment was affirmed. 105 Iowa, 169. Hughes was a surety on the supersedeas bond in that case. Plaintiff thereupon commenced this action to recover from Hughes and Chingren the damages sustained by him, charging that defendants conspired together to cheat and defraud; that the conveyance from Hughes to Chingren was without consideration, and that the one thousand-dollar mortgage was placed thereon by Mrs. Chingren for the fraudulent purpose of giving a fictitious value to the land; that, acting in concert with Hughes, Chingren proposed trade to plaintiff, and took him out to see the land, and then and there, with purpose to defraud, pointed out the wrong tract; that the land pointed out was worth from two thousand to two thousand four hundred dollars, and that the land actually conveyed was worth but four hundred dollars; that plaintiff believed he was trading for the land pointed out, and made the exchange in that belief; that everything said and done by Chingren was at the

instigation of Hughes, and in furtherance of the conspiracy; that Hughes took a chattel mortgage for his share of the profits from the conspiracy; and that he (Hughes) divided the fruits thereof between himself and Chingren. The allegations of fraud and conspiracy are denied by Hughes. On these issues the case was tried to a jury, resulting in a

2 verdict for plaintiff in the sum of two thousand six hundred and sixty-six dollars and seven cents. Motion for a new trial being filed, the court ordered that

the same be sustained unless plaintiff would remit all of the verdict in excess of one thousand seven hundred and ninety dollars. The remittitur was filed, and the motion for a new trial was overruled. Chingren has not appeared, and the record so clearly shows fraud on his part that we may assume, for the purposes of the case, that fraud in the trade has been established. The real issue in the case was, what was defendant Hughes' connection with the fraud? Was he a conspirator with Chingren? Shortly after the exchange of properties, Hughes sent a card to a wholesale house, asking them to ship a barrel of granulated sugar to Chingren at Barnum, and to forward the bill to him. Shortly thereafter a traveling man called on Chingren, to sell him goods, and was referred to Hughes. Hughes said, "Yes; I will guaranty the amount." Being informed that this was not suffi-

3 cient, Hughes then said, "Well, ship it to me, for Chingren." The goods sold were shipped to Hughes, marked "A. E. C." To meet this evidence, defendant

asked the court to instruct, in effect, that Hughes, as mortgagee, had the legal right to order new goods to go into the stock, and to guaranty payment thereof, and that he had the legal right to remove the stock from Barnum to Fonda. This instruction was refused. The ruling of the court was right, for the instruction assumed the validity of all prior transactions between Chingren and Hughes. These matters were in dispute, and the court would have committed error, had it given an instruction assuming the validity of matters in dis-

pute. In one of the instructions given, the court practically covered the matter by saying that, if previous transactions were in good faith, Hughes had the right to remove the stock to Fonda.

II. Defendant Hughes also asked an instruction to the effect that fraud and conspiracy are never presumed, and that, if the evidence offered was consistent with honesty and fair dealing, the jury should so find. The instruction
4 announced a correct rule of law, but we think the same thought was expressed in the eighth, tenth, eleventh, and thirteenth instructions. The latter part of the thirteenth reads as follows: "And if, upon the whole evidence in the case, the conduct of Hughes, as proven by the testimony, is as consistent with an honest purpose as with a fraudulent one, you should consider that no fraudulent purpose on his part has been proven; and, if not proven, then you should return a verdict in his favor." Surely there was no error.

III. A witness was permitted to testify that, before making the trade with plaintiff, Chingren had attempted to make a trade with some parties living at Newell, and that, in
5 one of the conversations relating to this trade, Chingren said that Hughes was in the trade with him. The reception of this evidence is a subject of complaint. The record is not such as to raise the question argued by plaintiff. The objection to the question that elicited the evidence was as follows: "To which the defendant makes the same objection as last above." This is preceded by the same kind of an objection. Going back to the last specific objection, and it reads as follows: "To which the defendant Hughes objects to any reference to this plat, as the court admitted the plat in evidence on the ground that plaintiff would follow up that testimony, and prove the corner that was started from by this surveyor." Manifestly, this objection is untenable. Going back two or three questions, we find another full objection that had no more application than the one we

have quoted. Going back still further, we find several objections that were not specific enough to be considered. And still further back we find another full objection, that may be the one on which defendant relies. But examination thereof discloses that it does not relate to a question calling for anything that Chingren may have said regarding Hughes' connection with the transaction. In answer to that objection the

6 court said, in effect, that he would instruct the jury with reference to that class of evidence. Chingren and Hughes were both defendants, and what Chingren said and did previous to the trade with plaintiff, tending to show fraud, was admissible as against him. *Starr v. Stevenson*, 91 Iowa, 687. Manifestly, there was no error here of which defendant Hughes may complain.

IV. The next complaint is that there is no evidence to support the claim that Hughes and Chingren were engaged in a conspiracy to defraud. A careful consideration
7 of the evidence leads us to the conclusion that the verdict is not without support, and we cannot interfere.

V. Chingren was a witness in his own behalf, and was asked regarding some statements made to one Hay relating to Hughes' connection with the transaction. He denied having made such statements, and further said that Hughes had no connection with it, save as grantor and mortgagee.

8 Hay was afterwards offered as a witness, and permitted to testify to a conversation he had with Chingren, in which Chingren said that Hughes owned the stock of goods. The evidence was properly admitted for impeaching purposes. *Neeb v. McMillan*, 92 Iowa, 201. Again, they were made while Chingren was in possession of the goods, and were properly received. *Turner v. Bradley*, 85 Iowa, 514; *Hardy v. Moore*, 62 Iowa, 65; *Allen v.*
9 *Kirk*, 81 Iowa, 664. But it is said that the court should have limited the effect of this evidence by an instruction. As no such instruction was asked, defendant

cannot complain. *Puth v. Zimbleman*, 99 Iowa, 647. What
has been said applies to the alleged error in re-
10 ceiving the evidence of one Hamilton. The court also
instructed: "If a conspiracy or combination to de-
fraud is established by other evidence, then the declaration
of either party to such conspiracy or combination, made in
carrying out the common purpose, will be held to be bind-
ing on both." This instruction limited the evidence of these
witnesses, and, in the absence of more specific request, was
sufficient.

VI. The rule as to the measure of damages given by
the court was as follows: "The difference between the actual
value of the land conveyed to plaintiff, and what would have
been its value if it had been such land as represented
11 and shown the plaintiff, with 6 per cent. interest from
date of transfer to time of trial." This is said to be er-
roneous. Plaintiff alleged that the land pointed out to him was
worth from two thousand to two thousand four hundred dol-
lars, and that the land he received was worth not to exceed
four hundred dollars. He also alleged, in effect, that the
land was valued in the trade at two thousand dollars, and
asked judgment for two thousand dollars actual and one
thousand exemplary damages. The verdict, as we have seen,
was for over two thousand six hundred dollars, but the court
reduced it to one thousand seven hundred and ninety dollars;
being one thousand six hundred dollars, with interest from
the date of the trade. Defendant Hughes says the verdict
is evidence of passion and prejudice, and should be set aside.
As the instruction did not limit the amount of plaintiff's re-
covery, it cannot be said, from the size of the verdict alone,
that it is the result of passion or prejudice. *Baxter v. City of
Cedar Rapids*, 103 Iowa, 599. But it is said that the in-
struction is erroneous because it does not recognize the
actual value as fixed by the parties in their trade.
12 Were we to concede that the value so fixed is con-
trolling, yet the court did not err in his instruction.

It was good as far as it went, and, if defendant desired an instruction to the effect that the actual value was the price fixed by the parties, he should have asked it. *Cox v. Allen*, 91 Iowa, 468; *Howest v. Artell*, 74 Iowa, 401. Moreover, the exact point now made does not seem to have been presented to the trial court. If it had been, we are not prepared to say there was error. The court was justified in ordering (as we have seen) a reduction of the verdict, and as, when reduced it did not exceed the amount claimed by plaintiff, there was no error.

VII. The deed from Hughes to Mrs. Chingren, and the mortgage back, were properly admitted in evidence. Evidence was also adduced, over defendant's objections, tending to show that while Burdick, Hughes' agent,
13 was in charge of the stock, he sold goods at ridiculously low prices. This evidence was properly admitted for several reasons: *First*. It tended to show an effort to speedily dispose of the stock. *Second*. The goods sold were staples,—practically new goods. Defendant offered evidence to show that the stock was of much less value than the sum fixed for trading purposes, and introduced evidence as to its value after he removed it to Fonda, and attempted to account for the proceeds while at Barnum. *Third*. The evidence complained of was offered in rebuttal, and was proper, as bearing on the value of the goods received.

VIII. Lastly it is said that the verdict is without support as to defendant Hughes. We have already indicated our views on this proposition, and may say that, from the bare statement of the case, it seems to have been an
14 unusual transaction. The character of the land, the alleged sale to Mrs. Chingren, the fictitious purchase price inserted in her deed, the conduct of Chingren in attempting and actually perpetrating a gross fraud, the fact that Hughes gained practically all the advantages of the trade, the evident fact that Mrs. Chingren was regarded as a mere figurehead, the conduct and admissions of Hughes with reference

to the stock of goods, the surrender by Hughes of his mortgage on the land, and the substitution of a chattel mortgage on perishable goods, together with many other circumstances, small in themselves, but all pointing in the one direction, led the jury to believe that defendant Hughes was a party to a conspiracy to defraud, and should be made to pay the penalty. As an appellate tribunal, we cannot say that the judgment is without support in the evidence, and, finding no error, it is **AFFIRMED.**

111	447
3131	309

W. L. CULBERTSON V. SALINGER & BRIGHAM, H. C. Mc-
ALISTER *et al.*, Appellants. SAME V. SAME.

111	447
3144	75

Modification of Judgment: EFFECT ON PENDING APPEAL. A judgment was entered against a defendant and his guardian, and both defendants appealed. Pending appeal, plaintiff obtained a modification of the judgment by the rendition of a second judgment, which defendants also appealed from.

- 1 The modifying judgment obtained by plaintiff made no changes except two which were in favor of defend-
- 2 ants and which eliminated two things complained of in defendant's appeal from the judgment first rendered. Appellants brought up the evidence on the first appeal and nothing but the record made on the modifying judgment, on the second appeal. *Held*, while appellee was entitled to have the first judgment corrected after same was appealed from, defendants' appeal still stood, and the evidence was properly brought up on that appeal. The effect of the correction obtained by appellee was to require appellee to bring up the corrected record as part of the appeal then pending.

Contracts: CONSTRUCTION. The recital in the last clause of an instrument, "This agreement shall not become operative till the said M. shall sign certain notes, heretofore agreed upon, as

- 3 surety for S.," does not mean that an independent agreement existed, binding M. to sign the notes, but only that the identity of the notes referred to had been settled by agreement

Appeal: PLEADING BELOW: *Waiver*. The original petition having based plaintiff's claim on a written contract, and the answer having in addition to a general denial, denied that M. "Agreed to pay or assume the payment of the several notes described

- 4 in the petition," and the case having proceeded on the theory that defendant's denial went to the amendment made by plain-

tiff, near the close of the trial, to the effect that the agreement was in part written and in part oral, the denial will be so treated on appeal.

Appeal from Carroll District Court.—HON. Z. A. CHURCH and HON. S. M. ELWOOD, Judges.

FRIDAY, MAY 18, 1900.

THESE two appeals are in the same case. They are submitted together, and may be disposed of in one opinion. The firm of Salinger & Brigham was indebted to plaintiff in a considerable amount, which was evidenced by their promissory notes. This action, so far as the issues here are concerned, was to recover of H. C. McAlister on his agreement to become surety on said notes. The original petition alleged that this agreement was in writing, but, after plaintiff's evidence was practically all in, an amendment to the petition was filed, in which it was charged that McAlister's undertaking was partly in writing and partly oral.

1 The case was tried to a jury, Hon. Z. A. Church presiding, and on plaintiff's motion a verdict was directed in his favor. A motion for a new trial was filed by one Lucius McAlister, representing himself as the duly-appointed guardian of H. C. McAlister, in which, among other grounds, it was stated that H. C. McAlister is, and was at the time of the trial of said action, insane, and that such fact was unknown to the attorney who appeared for him in the case; that no proper defense was made for him by a guardian, as by law required. A motion for a new trial was also filed in the name of H. C. McAlister. This last motion was, on plaintiff's application, stricken from the files. The motion of the guardian was overruled, and judgment rendered in this form: "And it is hereby further ordered by the court that the plaintiff, W. L. Culbertson, have and recover from the estate of H. C. McAlister and Lucius McAlister, his guardian, the sum of \$5,826.99, together with the costs of this suit, taxed at——." This judgment was entered on February 21, 1898, and on March 22d, following,

an appeal to this court was perfected by McAlister. This is the record in the first of these appeals. The second arises in this way: On January 12, 1899, plaintiff filed his petition, reciting the rendition of the judgment, and averring there was error in rendering a judgment against Lucius McAlister, guardian, he not being a party to the action, and asking that the judgment be corrected in this respect, and be made to run against H. C. McAlister. On the hearing of this matter in the district court, Elwood, J., presiding, an order was entered correcting the judgment as prayed, and also directing that the motion of H. C. McAlister "be not stricken from the files, as heretofore ordered, but be, instead, overruled." After the first judgment, but before the second proceeding was begun, H. C. McAlister died. From this order the second of the appeals before us was taken.—*Reversed.*

Geo. W. Bowen and Jayne & Hoffman for appellants.

B. I. Salinger and H. W. Macomber for appellee.

WATERMAN, J.—We have a number of motions in these cases which need not be specially noticed, for they will all be disposed of in what we have to say upon the merits of the controversy. Passing some objections to the notice upon which the second of these proceedings was founded, we will first consider the effect of the application on the ap-
2 peal then pending. We do not think sections 4091 and 4092 of the Code, under which this proceeding was had, have the effect claimed for them by appellee in a case of this kind, where the party successful in the action seeks to correct an error for which he is clearly responsible. It would be a singular and an unfortunate state of affairs if an appellee could defeat an appeal taken to this court, whenever he saw fit, by merely applying for a modification of the judgment under the sections mentioned, yet that is substantially what is claimed on plaintiff's part. It is said

the final judgment is the modified one, and from this, only, an appeal will lie, for two appeals cannot be taken from the same judgment. The effect of this is that there is no final judgment until after the expiration of one year from the date of the original judgment, for during that period an application to modify may be made, and the right of appeal exists for only six months. Truly, an appellant is placed in a dilemma if such a rule be adopted.' Doubtless appellee was entitled to have the judgment entry corrected after the appeal was taken, but the effect was not to merge the first judgment in the later one. Defendants' appeal still stood, and the evidence taken on the merits of the case was properly brought here on that appeal. The effect of the correction at appellee's instance was to impose upon him the burden of bringing into this court, as a part of the appeal then pending, the corrected record. This holding disposes of a number of contentions made by appellee, which need not be pointed out singly. We may also say at this time that the assignments of error are sufficiently specific to present the questions we deem necessary to be considered.

II. This brings us to the question of McAlister's liability. It is claimed the obligation of McAlister was partly oral, and in part in writing. The only testimony which is claimed to relate to an oral promise is the following, given by the witness Salinger (we set out question and answer, so that the effect of the evidence may fully appear): "Q. You may state to the jury why those notes were not signed by Dr. McAlister. A. By the time the Culbertson letter and these blank notes got down to Manning, Dr. McAlister had already been there some little time. He was pretty nervous and uneasy, and wanted to get home, when these blank notes came down from Culbertson. We ourselves did not feel like signing them ourselves, or having Dr. McAlister do it, until we went up to Carroll and checked it up, and could see whether there was that much coming due. It was finally agreed to make the contract anyhow, because whatever there

was due on notes, we could find it out and the blank notes were dated December 1st,—nearly fourteen days yet. Made out the contract of November 16th, and Dr. McAlister took his duplicate with him, and then we looked it up in Carroll to see whether that was the right amount. We were to send them down there; then he would sign them and return them to us. He did not want to wait until it was looked up. He took away his end of it, in other words, before these notes that Culbertson sent down were signed. The three parties made this contract about two days after we got this letter to the best of my recollection; some little negotiations afterwards, anyhow.” It is apparent that this is a very indefinite testimony upon which to base a finding of an agreement distinct from the writing. No such thing was inquired for, nor does it appear from this answer, even standing alone, that the witness was speaking of anything else than the negotiations which led up to the writing; and it is admitted the writing did not obligate McAlister absolutely to sign the notes. But, to strengthen this view, we set out the next question asked of this witness, who, by the way, was under direct examination: “Now, I will ask you if Dr. McAlister ever carried out this agreement that is contained in this paper.” It is clear from this that plaintiff’s counsel in the court below understood the answer we have quoted as referring only to negotiations leading up to the making of the writing. It is needless to do more than say that these are merged in that instrument. We find no evidence of any oral agreement on McAlister’s part. We turn now to the writing which was first claimed upon. It is in these words: “Manning, Iowa, November 16, 1891. On this day Benj. I. Salinger and L. P. Brigham have made their three notes for \$2,400.00 each, drawing 8% interest, due November 16th, 1895, 6, and 7, respectively; no interest payable until January 1, 1892; annually thereafter to H. C. McAlister. These notes are given in full of account between said parties to date, in full of settlement of all former notes given, and

all matters growing out of the loaning and handling of McAlister's money by said other parties. As collateral to said three notes, Benj. I. Salinger has turned over to said McAllister the following policies of insurance on the life of the said Salinger, on which he agrees to keep up the premiums: #298,874, New York Life Insurance Company; #444,300, Equitable Life Assurance Association of the U. S.; #15,285, Connecticut General Life Ins. Co. Said Salinger has this day sold to said McAlister his law library, by bill of sale in writing of even date herewith. Said library is to remain in the possession of said Salinger, and may be removed from the state by him. When said three notes are paid, the title to said library and to said life insurance policies shall revert to said Salinger. All collaterals heretofore deposited with said McAlister, or held for him by said Salinger & Brigham, are now the property of said last-named parties; and this includes all choses in action and suits pending now standing in the name of, or enforceable, by said McAlister. All the personal property now standing on the farm adjoining the town of Harris, in Osceola county, Iowa, is now the property of said Salinger & Brigham, except that, out of the proceeds of the sale of the same, McAlister is to be paid \$1,000.00, to be applied as a payment on said three notes. As further collateral, McAlister shall receive what are known as the 'Ryckman Notes,' now on deposit with W. L. Culbertson at Carroll, Iowa.

3 This agreement shall not become operative until the said McAlister shall sign certain notes, heretofore agreed upon, as surety for said Salinger & Brigham, and the same when so signed, accepted by the said Culbertson in full of settlement of all matters between Culbertson and Salinger & Brigham. Benj. I. Salinger. L. P. Brigham. H. O. McAlister." As we have said, plaintiff now concedes no obligation is imposed on McAlister by this writing, and this is manifest from its terms. It is purely optional with McAllister whether he would sign the notes, and this he

never did. It was a settlement of matters between the parties on certain terms, if McAlister chose to accept the same, and he declined finally to do this. But it is claimed on plaintiff's part that the last clause of this instrument recites an oral agreement to sign the notes. The language referred to is this: "This agreement shall not become operative until the said McAllister shall sign certain notes, heretofore agreed upon, as surety for Salinger & Brigham," etc. This does not mean that an independent agreement existed, binding McAllister to sign the notes, but only that the identity of the notes to which this writing referred had been settled by agreement. The language used here was clearly so employed only to avoid setting out a description of the notes. We have examined this record carefully, and fail to find any evidence warranting a judgment against McAlister.

Some question is made by plaintiff as to the sufficiency of the answer to put in issue defendant's want of liability on the oral contract pleaded. The original petition, as before remarked, based the claim of plaintiff on the
4 written contract. The answer, among other things, denied that McAlister "agreed to pay, or assumed the payment of, the several notes described in the petition, or either or any part of them." There is also a general denial. At about the end of plaintiff's case he amended his petition by alleging that the agreement to sign the notes was in part written and in part oral. This was apparently done to have the pleadings correspond, as was supposed, with the proof. No further pleading was filed by defendant McAlister, nor was any question raised in the trial court because of his failure to do so. The case proceeded on the theory that his denial went to the amendment, and we shall so treat it here. *Hoyt v. Hoyt*, 68 Iowa, 703; *Alleman v. Stepp*, 52 Iowa, 626; *Warren v. Chandler*, 98 Iowa, 237. On both appeals, REVERSED.

J. R. RICE, Appellant, v. PETER APPEL.

Purchase Price: DEMAND: *Authority of agent to make.* Where the agent of a nursery sold an order of trees to the defendant, to be paid for on delivery, an instruction that tender of the
2 stock was insufficient if coupled with a demand for the purchase price, because the agent had no right to make such a demand, was erroneous, where, by the terms of the contract, the plaintiff was entitled to his pay on delivery.

Evidence: ADMISSIBILITY: *Issue of fraud.* Where defendant, in his answer, raised the issue of fraud in the procurement of a con-
1 tract to deliver trees to him, evidence as to the value of the trees tendered by the plaintiff in pursuance of such contract was properly admitted, as bearing on its reasonableness.

CURING ERROR. Error in the admission of evidence was cured by an
1 instruction that such evidence was so indefinite and uncertain that the jury should not give it any attention.

Appeal from Shelby District Court.—HON. W. R. GREEN,
Judge.

FRIDAY, MAY 18, 1900.

ACTION at law to recover the purchase price of a certain amount of nursery stock sold the defendant. Defendant denied that the goods purchased were ever tendered, and pleaded fraud in the making of the contracts. The case was tried to a jury, resulting in a verdict and judgment for defendant, and plaintiff appeals. *Affirmed*, if the defendant consents within thirty days to a judgment in this court for twelve dollars and fifty cents, with interest, and one-fourth of the costs; otherwise, *Reversed*.

Spurrier & Maxwell and *Geo. W. Cullison* for appellant.

No appearance for appellee.

DEEMER, J.—The action is on two written contracts,—one of date January 27, 1897, for the purchase of nursery

stock amounting to twelve dollars and fifty cents; and the other of date February 23, 1897, for the purchase of such stock amounting to two hundred and seventy dollars. Defendant makes no objection to the first contract, but claims that the goods described therein were never delivered or offered to him. The second order, he claims, was procured by fraud, in that he was unable to read or write, and that the agent who took the contract misrepresented the contents thereof, and induced him to sign the same; that it is not his contract, and that the agreement between him and the agent who took the order was that he (defendant) should pay for the stock by giving a share of the fruit raised therefrom. The court submitted these issues to a jury, and it is now contended that it erred in the admission of evidence regarding the character of trees tendered defendant. As de-

1 defendant's answer contained a denial of any tender of stock of the kind and quality called for, evidence bearing on this issue was properly admitted. After the evidence was all adduced, the court said, with reference to the delivery of the stock contracted for by the larger order: "The evidence on this issue is so indefinite and uncertain that you should not give it any attention, and the issues thus presented by defendant must be regarded as not supported by the evidence." The jury were further instructed that the only issue regarding the larger order was fraud in obtaining the same. Whatever error there may have been in the reception of this evidence was cured by these instructions. Evidence as to the value of stock included in the larger order was admitted, and the court instructed that such evidence could only be considered as bearing on the reasonableness of the contract, and as throwing light on defendant's claim of misrepresentation. Where fraud is pleaded, the unreasonableness of the contract may properly be considered, for a wide door is opened by this issue.

II. When plaintiff's agent attempted to make delivery, he tendered all the goods that he claimed were ordered by

defendant, and demanded payment for the whole amount before delivery. Defendant admits that he refused to accept all, but says he did agree to take and pay for those covered by the smaller contract. This is denied by the plaintiff's agent, who also says that defendant refused to accept the smaller order. The contract provides that defendant
2 should receive the goods and pay for same on delivery.

In the instructions the court said, in effect, that it was incumbent on plaintiff, not only to show tender of the stock covered by the smaller order, but that such tender was insufficient, if coupled with a demand for the purchase price, for that plaintiff's agent had no right to make such demand. Under the terms of the contract, plaintiff was entitled to his pay upon delivery, and as no time was given, it was the duty of defendant to make payments on receipt of the goods. Delivery and payments were mutual and concurrent acts, and plaintiff's agent authorized to make delivery had the undoubted right to demand payment as a condition precedent to delivery. Benjamin Sales (6th ed.) p. 721, section 677; *Day v. Bassett*, 102 Mass. 445. Delivery and payment were simultaneous and concurrent acts, and payment was a condition precedent to the delivery of the goods. Newmark Sales, section 225, and notes. This error is so patent that it cannot be overlooked. As the jury found for the defendant on the issues relating to the larger contract, and there was no prejudicial error that in any manner affected their finding on this issue, the case should not be remanded for further hearing on that matter. We are at a loss to know what to do with the case in view of the condition of the record, but have concluded to reverse it, unless defendant, within thirty days from the filing of this opinion, consents to a judgment for plaintiff in this court for the sum of twelve dollars and fifty cents, with six per cent. interest from April 20, 1897, and one-fourth the costs. Should he so consent by an election filed with the clerk, the judgment, as thus modified, will stand affirmed; otherwise, REVERSED.

M. C. CARTER, Appellant, v. FRED MILLER BREWING COMPANY, HENRY POTRATZ, Agent, and certain real estate.

Mulct Law: VIOLATION: *Injunction.* The maintenance of a cold-storage warehouse wherein intoxicating liquors¹ are kept for sale, and the filling of orders from such warehouse is a violation of the mulct statute and may be enjoined.

Appeal: REVIEW: *Party not appealing.* Where defendant has not taken an appeal, the supreme court, on an appeal by plaintiff, will not consider the action of the trial court in suppressing certain depositions taken by defendant.

Appeal from Winneshiek District Court.—HON. L. E. FELLOWS, Judge.

FRIDAY, MAY 18, 1900.

APPLICATION in equity for an injunction against a liquor nuisance in the city of Decorah. The petition was dismissed at plaintiff's cost, and from this judgment he appeals.—*Reversed.*

E. R. Acres for appellant.

John B. Kaye for appellees.

WATERMAN, J.—Defendants complain of the ruling of the trial court in refusing to suppress certain depositions taken on behalf of plaintiff, but as defendants do not appeal we cannot consider the matter.

II. Question is made as to whether the mulct statute was operative in the city of Decorah. We do not find it necessary to pass upon the various matters discussed under this head; for, on the assumption that such statute was in effect, its terms and provisions were manifestly violated. The Fred Miller Brewing Company, a foreign corporation, through its agent Potratz, maintained a

cold-storage warehouse on the real estate proceeded against, wherein intoxicating liquors were kept for sale. Concededly, defendant solicited orders in different places about the city for beer, and filled such orders from its stock in the warehouse, delivering the liquors to its various customers at their respective business houses. This was a violation of the statute. *Bartel v. Hobson*, 107 Iowa, 644; *Cameron v. Fellows*, 109 Iowa, 534. It is urged on behalf of appellee that a cold-storage warehouse cannot be conducted, if the liquors must be kept and sales made in a single room. If this is true, it may be an argument in favor of amending the statute, but does not warrant us in misconstruing its plain terms. A writ of injunction should have been granted. The costs of printing appellant's additional argument will be paid by him.—REVERSED.

111 458
133 401

LUCIE W. HITT, H. P. GALPIN, Administrator, with will annexed substituted as plaintiff, Appellant, v. STERLING-GOOLD MANUFACTURING COMPANY *et al.*, Defendants. FIRST NAT. BANK, GERMAN-AMERICAN SAVINGS BANK AND W. H. PERRY, Interveners.

Witnesses: COMPETENCY: Stockholders. A stockholder in a corporation is not a person interested in the result of a contest
4 between two creditors, to each of whom the corporation is indebted, within Code, section 4604, rendering such a person incompetent as a witness to a transaction with the defendant.

AND WIFE: Divorce. One divorced from his wife is not competent as a witness, under Code, section 4604, providing the evidence of a husband of a party to an action or of a person interested in the result, to a personal transaction with the deceased shall not be received against the executor or administrator or deceased; nor under section 4606, providing that neither husband nor wife shall be a witness against the other.

Under Code, section 4607, which prohibits the testimony of a husband and wife as to communications made by one to the other even after the marriage has been terminated, it is, at

least, doubtful whether the testimony of a divorced husband
5 concerning an agreement made by him as agent of his wife, to withhold a mortgage belonging to her from record, is inadmissible, for such testimony may not involve any communication between husband and wife.

Contracts: OFFICER AND STOCKHOLDER WITH CORPORATION. For one who is a stockholder in and secretary of a corporation, but not
6 on its board of directors, to make an agreement with the board, is not to make an agreement with himself.

Assignment for Benefit of Creditors: STANDING OF INTERVENERS TO ATTACK. Where a mortgage is valid against the assignee for the benefit of creditors of the mortgagor, and is attacked by subsequent creditors solely on the ground of fraudulent agreement between the mortgagor and mortgagee whereby the mortgage was withheld from record to give the mortgagor a fictitious credit, such creditors may attack the mortgage by intervening in the suit to foreclose it, and this, though their judgments were subsequent to the assignment, so that they did not become liens on the land, and no execution is thereafter levied on the property or returned *nulla bona*.

Intervention: GENERAL DENIAL: Burden of proof. A general denial
1 to a petition in intervention, on foreclosure, puts interveners on proof of every fact essential to authorize the relief sought.

Appeal: OBJECTION BELOW. Objection that intervention was not
7 timely cannot be made for the first time on appeal.

Appeal from Plymouth District Court.—HON. F. R. GAY-
NOR, Judge.

FRIDAY, MAY 18, 1900.

LUCIE W. HITT brought an action against the defendant company to foreclose a mortgage executed to her by said company on certain real estate. L. W. Meyers, assignee of the company for the benefit of creditors, was also made a party defendant, and filed an answer in his own behalf. March 4, 1897, a judgment and decree of foreclosure by default in that action were rendered against the Sterling-Goold Manufacturing Company, and the cause stood continued as to Meyers, assignee. Later, W. H. Perry, the German-American Savings Bank, and the First National Bank,

judgment creditors of the Sterling-Goold Company, intervened, claiming that the mortgage to plaintiff was fraudulent, and asking that their judgments be declared liens on the mortgaged property. There was a decree in interveners' favor, and plaintiff appeals.—*Affirmed*.

E. T. Bedell and Ira T. Martin for appellant.

Sammis & Scott for appellees.

WATERMAN, J.—Lucie W. Hitt died after the action was begun, and H. B. Galpin, administrator with her will annexed, was substituted as plaintiff. At the threshold of this case we find the question of the interveners' standing to attack the validity of this mortgage. Appellees claim the pleadings do not present this issue. A general denial was interposed to the petition in intervention. We think this put the interveners on proof of every fact essential to authorize the relief sought. They had alleged the making of the general assignment, and the burden was upon them to show facts authorizing a decree as against the rights of the assignee. The record does not disclose that these claims were ever filed with the assignee. The assignment was made, as we have said, in 1895; the judgments of interveners were obtained in 1897. The arguments made do not set out very fully the grounds for the claims of the respective parties. Taking the record as our guide, we should say plaintiff's contention is that the title to this real estate passed to the assignee by the deed of assignment. When the judgments were rendered against the Sterling-Goold Company, they did not become liens on the real estate, and no levy of execution has since been made thereon. The interveners, therefore, have no liens. Not having attacked the assignment, they must be deemed to recognize and assent to its validity. If any right exists to attack the mortgage, it must reside in the assignee, and, if exercised, will be for the benefit of all creditors,—citing

Schaller v. Wright, 70 Iowa, 667. This is appellant's position, as we understand it, and the answer to it seems to us plain under the facts here disclosed. The mortgage is valid as against the assignee. It was made for a lawful purpose, and upon a valuable consideration, and is attacked by these subsequent creditors solely on the ground of a fraudulent agreement between the mortgagor and mortgagee by which the instrument was withheld from record in order to give the debtor a fictitious credit. If these interveners cannot proceed in this manner outside the assignment, the proceeds of this property to the extent of the amount due on the mortgage will be wholly lost to them. The insolvency of the Sterling-Goold Company is conceded. Therefore, under our practice, the judgment creditors were not required to have an execution returned *nulla bona*, in order to file creditors' bills. *Gordon v. Worthley*, 48 Iowa, 429. When interveners obtained these judgments, they had a right to proceed in equity to establish a lien upon property fraudulently conveyed by their debtor. *Loving v. Pairo*, 10 Iowa, 282; *Millen v. Dayton*, 47 Iowa, 312; Waite, *Fraudulent Conveyance*, section 73. While the creditor may levy execution on property which his debtor has fraudulently conveyed (*Harrison v. Kramer*, 3 Iowa, 543), he is not obliged to do so, but may proceed in equity to have the property subjected to his judgment. *Bridgeman v. McKissick*, 15 Iowa, 260. What is sought here in no way conflicts with any right of the assignee, nor is the relief of such a character that it could be obtained through him. The right claimed by these creditors would concededly exist if there was no assignment. How, then, is it destroyed when no interest vests in the assignee that in any way conflicts with such right, or with the assertion of it, in the manner here pursued? In our opinion, interveners have a proper standing in court to seek the relief asked.

II. Objection is made to the testimony offered to prove the fraud. Treat, who was the husband of plaintiff at

the time the mortgage was made, was introduced by the creditor, to prove the agreement to withhold the mortgage
3 from record. His testimony was objected to as in violation of sections 4604-4607 of the Code, and for other reasons, which will be noticed. The first section mentioned provides that the evidence of a party to an action, or a person interested in the result, or the husband or wife of such party or person, to a personal transaction with one deceased, shall not be received as against the executor or administrator of such decedent. Treat was not the husband
4 of plaintiff when he testified or when this action was begun. He had been divorced. He was a stockholder in the Sterling-Goold Company, but he cannot be said to have any interest in the result of this action, because this is a contest between two creditors, to each of whom the corporation is indebted. Section 4606 provides that in cases of this kind neither husband nor wife shall be a witness against the other, and section 4607 forbids their testifying to communications made by one to the other even after the marriage relation has ceased to exist. Section 4606 does not apply if the marriage relation has been severed when the witness is offered. *Parcell v. McReynolds*, 71 Iowa, 623. Under section 4607 much of Treat's evidence should be excluded, but he was indisputably his wife's agent in the transaction of making the loan and taking the mortgage. His own testimony is sufficient, perhaps, to establish this fact. *O'Leary v. Insurance Co.*, 100 Iowa, 390. The objection to the question calling for the fact of agency seems to be based upon section 4604, and not upon
5 section 4607. For the reasons already stated, it is not violative of the first section. It may well be doubted whether it is contrary to section 4607; for, while it is a transaction, it may not have been a communication. *Hanks v. Van Garder*, 59 Iowa, 179. Aside from these considerations there was ample evidence from other witnesses to the fact that Treat acted for his wife in all her financial

transactions; that he was her general agent in matters of this kind. The fact of agency being shown, the terms upon which Treat took this mortgage, as assented to by the mortgagor, are adequate to establish the fraud, and these terms are sufficiently shown outside of Treat's testimony. The agent's agreement is, of course, binding on the principal.

6 Some claim is made that Treat, as agent for his wife, could not make an agreement with himself (for he was secretary of the Sterling-Goold Company) to withhold the mortgage from record. This is not what was done. The negotiations and agreement were between Treat, as agent for his wife, and the board of directors of the company, and neither Treat nor his wife, who was also a stockholder, was upon the board. As well might it be said that Mrs. Treat's mortgage is not valid because she, being a stockholder, could not agree with herself. The claims of interveners accrued after the making of this mortgage, and before it was recorded. The evidence shows they were unaware of its existence, and extended credit in the belief that the real estate was unincumbered. The fraud is sufficiently shown.

III. Finally, it is insisted that the intervention was not timely; that a decree had been rendered when these petitions were filed. The case was still pending against the assignee when intervention was had, but it is sufficient to dispose of this point that no such question was raised in the trial court. *Reed v. City of Muscatine*, 104 Iowa, 183. The decree of the trial court is **AF- FIRMED**.

G. W. ZOOK v. I. ROSS THOMPSON, Appellant.

Readjudicata: MATTERS NOT NECESSARILY CONSIDERED IN FORMER SUIT. Plaintiff sold defendant real estate for one hundred dollars cash, and four hundred dollars to be paid on delivery of a warranty deed, an abstract showing good title, and a note for

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130 95

111 463
142 195
142 196

five hundred dollars, to be executed at the same time. On
1 refusal of defendant to carry out the agreement because of
alleged insufficiency of title, plaintiff brought an action for
2 the nine hundred dollars and prayed for a vendor's lien and
obtained a decree for four hundred dollars, and that the de-
fendant execute him a note for five hundred dollars, which
was done by agreement of the parties, on dismissal of defend-
ant's appeal. *Held*, that in a subsequent action by plaintiff
to recover on the note so executed and for a vendor's lien, the
decree in the former action did not constitute an adjudication
of plaintiff's right to the lien, since in the former action the
court had no occasion to pass on the lien.

Vendor's Lien: WAIVER: *Evidence.* The fact that a vendor of land
entered into a written contract, and accepted a note for the
purchase price, was not sufficient to constitute a waiver of
3 his right to a lien for the same, in the absence of clear proof
that such was the express agreement of the vendor.

Appeal from Polk District Court.—HON. C. A. BISHOP,
Judge.

FRIDAY, MAY 18, 1900.

ACTION in equity upon a promissory note, asking the
establishment of a vendor's lien for the purchase price of real
estate. There was a decree for the plaintiff, and the defend-
ant appeals.—*Affirmed.*

Read & Read for appellant.

Edward A. Davis for appellee.

SHERWIN, J.—On the tenth day of August, 1895, the
plaintiff sold the defendant real estate for the agreed price
of one thousand dollars. One hundred dollars was paid in
cash, and the plaintiff agreed in writing to accept as
1 full payment therefor, upon delivery of a warranty
deed and abstract, the further payment of four hun-
dred dollars cash and a note for five hundred dollars, bear-
ing seven per cent. interest per annum from the fifteenth
day of August, 1895, and due in one year. The defendant

took possession of the property, and thereafter difficulty arose between plaintiff and defendant, which resulted in the defendant's refusing to pay the four hundred dollars cash and to execute the five hundred-dollar note. The plaintiff thereupon brought suit to collect the nine hundred dollars balance of unpaid purchase money, and asked therein that a vendor's lien to be given him for the same. In answer to that suit the defendant alleged that the plaintiff had failed to furnish him an abstract showing a good title to the land, as agreed, and had failed to remove certain clouds upon the title thereto, and that he was ready to perform his contract whenever the plaintiff would perform on his part. A trial was had, and the court decreed that the plaintiff was entitled to judgment for four hundred dollars, and that the defendant execute and deliver to the plaintiff his note for five hundred dollars, in accordance with the terms of the sale. This judgment was appealed from by the defendant, but the matter was subsequently adjusted by the parties themselves, the money paid, and the note executed to plaintiff as in the judgment required, and the appeal was dismissed. The note then given to plaintiff is the one sued on herein. There was no defense to the note itself, but the claim for a vendor's lien is resisted on the ground that it was waived by the plaintiff at the time of the sale and since, and that there was an adjudication of the plaintiff's right thereto in the former suit. In the former action no issue was tendered as to the plaintiff's right to a vendor's lien. Upon the trial of the case the plaintiff tendered full compliance with his agreement, and the court, it is evident, thereupon decreed what was, in effect, a specific performance of the contract on the part of the defendant. There was no finding that the plaintiff was not entitled to his lien as prayed as to any part of the purchase price of the land. The plaintiff did not ask that it be established as a notice to third parties before the five hundred-dollar note became due, and the court had no occa-

sion to pass upon the question. The decree put the parties in the position they would have been in at first had both complied with the terms of sale. Nothing further was attempted therein, and we reach the conclusion that there was no adjudication of the question under consideration, and no reason why it should have been determined at that time, at least so far as the amount represented by the note in suit is concerned. The law giving the vendor a lien for purchase money is well settled in this state. *Pierson v. David*, 1 Iowa, 23. The mere taking of a note, therefor, does not waive the lien. In order to so operate, it must be shown by a clear preponderance of the evidence that such was the express agreement of the vendor. *Farwell v. Salpaugh*, 32 Iowa, 583; *Port v. Robbins*, 35 Iowa, 208; *Bank v. Gifford*, 79 Iowa, 300. Nor is the written contract, in our judgment, conclusive upon the question. The note in suit represents nothing but a balance due for the purchase price of the land sold to the defendant, and we think the trial court rightly found that a waiver of the vendor's lien was not sufficiently proven. The judgment is **AF- FIRMED**.

NELSON HULL AND JOHN T. LIDDLE, Executors of the Estate of O. N. HULL, Deceased, v. CITY OF CEDAR RAPIDS, Appellant.

Dedication to City: EVIDENCE. Dedication of a strip in extension of a street, and acceptance thereof by the city, are shown by the owner selling lots on either side, representing the same as corner lots, and acquiescing in the use of the same as a public street for fourteen years thereafter, and by the construction of fences on either side, with gates opening into the street, the building of sidewalks and planting of trees along it, and the improvement of it by the city by digging side ditches along it and keeping them open, working the middle of the road and clearing away the snow in the winter.

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116	198
116	194
117	307
111	466
122	571

TAXATION BY CITY: *Estoppel*. Exaction by a city of taxes on property after its dedication as a street does not estop it from claiming that it had become a public street.

Appeal from Linn District Court.—HON. W. N. TREICHLER, Judge.

FRIDAY, MAY 18, 1900.

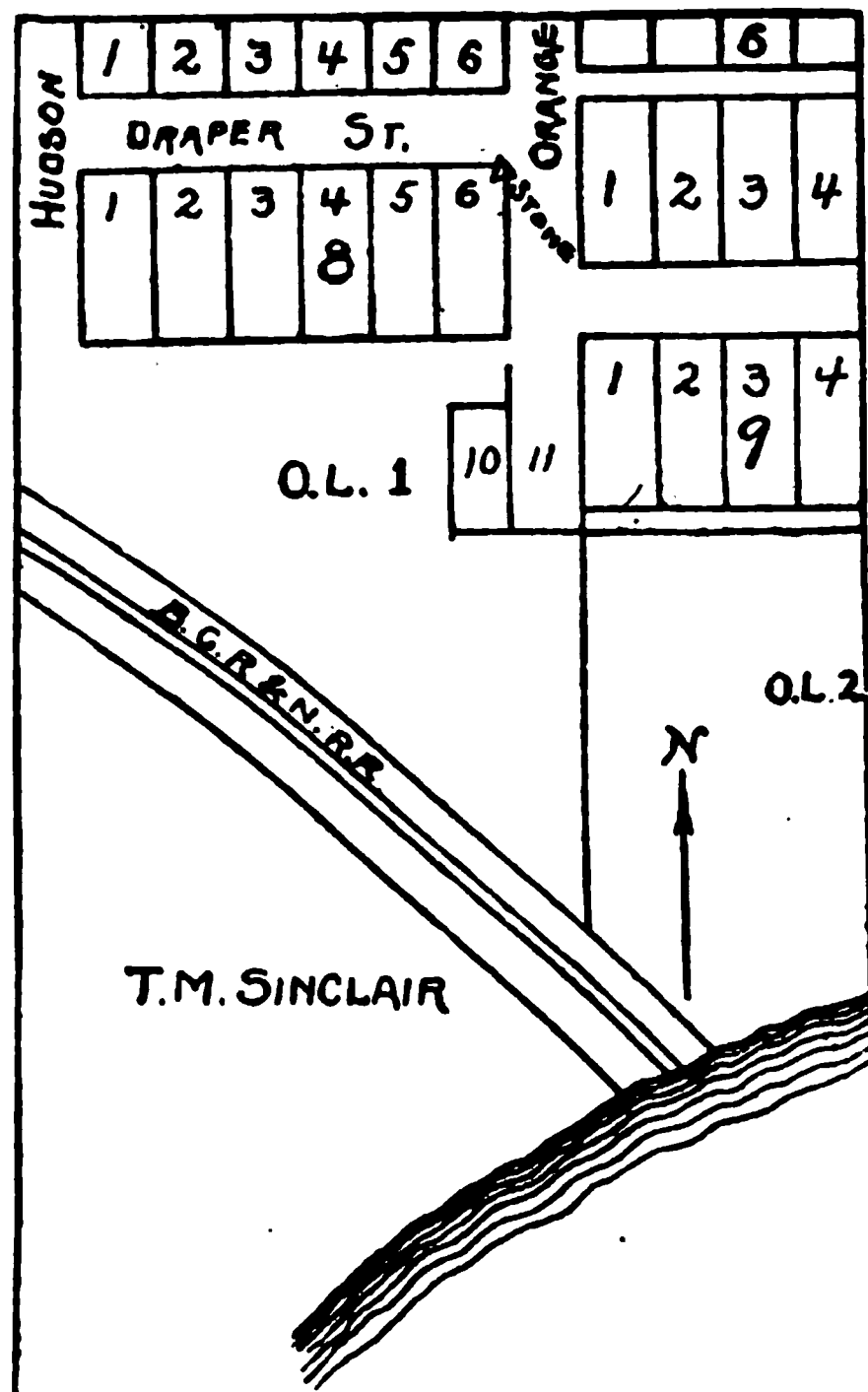
ACTION in equity to quiet title to a strip of land. The defendant pleaded that it had been dedicated by the owner as a public street, and accepted by the city as such. Decree was entered as prayed, and defendant appeals.—*Reversed*.

John N. Hughes for appellant.

Deacon & Good for appellees.

LADD, J.—O. N. Hull's Second addition to Cedar Rapids was platted May 18, 1873. Outlet 1 lies between a twenty-foot alley, south of block 8, and the right of way of the Burlington, Cedar Rapids & Northern Railway. The outer lines of Hudson street, to the west, and Orange street, to the east, of said block, extended to said right of way. In January, 1875, Hull conveyed a lot forty feet wide by one hundred and twenty-feet in length, north and south, immediately south of the easterly lot of block 8, to one Thusty. The north boundary line was twenty feet south of the alley, and the east line sixty feet west of lot 1 in block 9, leaving a space corresponding with Orange street extending to the south line of the alley south of said block. This strip, sixty feet wide and one hundred and forty feet long, is the ground in controversy. It was designated on the county auditor's plat, filed in 1895, as lot 11, and that conveyed to Thusty as lot 10, and they may hereafter be referred to by these numerals. Later, nine lots of like proportions directly to the west of lot 10 were sold, leaving between their north boundary, in addition to the alley, a strip twenty feet wide,

and it is conceded that this was intended as a roadway. To avoid misapprehension, a part of the plat may be set out:



The law applicable to such a case is too well settled to require discussion here. See *Hanger v. City of Des Moines*, 109 Iowa, 480, and cases cited. A careful examination of the evidence, in which there is little or no conflict, has led us to the conclusion that the land in controversy was dedicated by Hull as a part of the public highway, and accepted as such by the city. In selling the lot 10 to Tlusty, he represented it to be a corner lot, and did likewise in bargaining lot 1 in block 9 to Josepek in 1876. These parties bought in reliance on his statement that lot 11 was a street. It is the precise width of Orange street, while the lots sold are twenty feet narrower, and extends far enough south to connect with the alley below block 9. These

parties fenced their lots, leaving gates into this strip; and the city shortly afterwards dug a ditch on each side of it, through which to drain the water into the river. Hakl, to whom Thusty transferred his lot, constructed a sidewalk and planted a row of trees in this strip, about eight feet from his lot line, in 1881; and these were six inches in diameter when he sold the property, ten years later. The portion of outlot 1 not conveyed in lots appears to have been unfenced up to 1890, and until then pedestrians, as well as teams and wagons, were accustomed to pass over lot 11, down to the river, and under the railroad bridge to the packing houses. Thusty says, "There was considerable travel of the people and wagons going through there." Hakl testified that: "There was lots of travel down that street. Farmers hauled wood and hay in there, and went into the alleys and unloaded things there. This continued all the time I lived there. In the winter the city came down there with the snowplows and scraped the snow off. They worked the center of the street in the summer, and they fixed the ditches, and throwed the dirt out of the ditches into the middle of the street." Krolik, who resided in the addition, also testified: "I worked in the packing house from 1877 to 1890. To my own knowledge, I know this street was traveled all the time during those years. There were water ways on each side of the street. The street had been considerably traveled during the last eight or nine years. From this street you could get out along the back of the lots in block 9. Before the stock yards put the tracks in there, you could walk down there, and under the bridge. Now you have to walk down there, and through the alley." Since the portion of outlot 1 not conveyed in lots has been fenced, travelers, in going to the railroad, turn into the alley below block 9; and a sidewalk has been constructed on the bridge, and along the right of way, for the convenience of people living in the suburbs beyond. But there need be no concern as to the use of this strip of land subsequent to 1890, for it had been traveled as a public

highway for more than ten years prior to that time. That will be assumed to be the time of Hull's death, as Leddle declared he had been executor of his estate about nine years. Also, the deeds recite that Hull was a resident of Linn county, and a status once established is presumed to continue. He had sold the lots on each side of the strip in controversy on the assurance that it was a public street, and acquiesced in its use as such for about fourteen years thereafter. *Manderschid v. City of Dubuque*, 29 Iowa, 73.

The further fact may be added that these executors made no claim whatever to the property, other than by paying taxes levied by the city thereon in 1896 and 1897, and "for prior years." Whether Hull ever paid any is
2 not disclosed by the record, and their exaction by the city after the property had been dedicated did not estop it from setting up its claim that the strip had become a public street. *Getchell v. Benedict*, 57 Iowa, 121; *Hanger v. City of Des Moines*, *supra*.

Travel may have been more extensive on other streets of the city, but it appears to have been as much here as though laid out under the statute, and "as the circumstances
3 of the surrounding population and their business required." True, it extended no further than the alley south of block 9, but during all the time referred to the land below was uninclosed, and traveled in passing to the river and packing houses. It may have been Hull's thought that a street might be opened to the track, but, whether so or not, his statement with respect to this land, followed by the construction of fences on either side, with gates opening on it, the building of a sidewalk and planting of trees, together with the small improvements by the city, and its use for a public highway so long a time, furnishes very satisfactory evidence of his intention to dedicate. *Hanger v. City of Des Moines*, *supra*. The extent and character of work by a city, essential to show its acceptance of a street, must depend very largely on the necessity for its improvement. Very

little was required here to keep it in suitable condition for travel, and this appears to have been accomplished in a timely and satisfactory manner. The side ditches were dug and kept open, the middle of the road worked, and the snow cleared away in the winter. So far as the record discloses, this was all that was reasonably necessary, and certainly indicates the city's claim thereto. See *Devoe v. Smeltzer*, 86 Iowa, 385. The criticism of the testimony because coming through interpreters is without merit.—REVERSED.

MARIA CATHCART AND FRANK WETHERELL V. THE EQUITABLE MUTUAL LIFE ASSOCIATION OF WATERLOO, IOWA, Appellant.

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115	738

111	471
1133	61

Mutual Insurance Associations: CONSOLIDATION AGREEMENT: *Not an insurance contract.* Where a mutual insurance association transferred its membership to another association under an agreement that the latter should carry out the insurance contracts of the former; such arrangement was not an agreement to insure, within Code, section 1767, prohibiting such an association from insuring a person over sixty-five years of age, and hence the fact that a member of the association whose membership was so transferred was over sixty-five years of age at the date of the agreement did not release the latter association from liability on his certificate.

REINSURANCE CONTRACT: Construction. Where a mutual insurance association received the membership of another association under an agreement that the mortuary fund contributed by the members who should *thereafter* join the consolidated association should inure to the benefit of members of both associations, the beneficiaries of a member of the transferred association were not entitled to compel an assessment on all the members of the consolidated association to pay the death benefit of their insured, since such agreement, inferentially, excluded those who became members of the reinsuring association before the consolidation.

DUTY TO ASSESS: Estoppel to deny. Where a mutual insurance association received a transfer of all of the members and property of another association, and collected assessments from them as its members, under a contract to perform the former

4 association's obligations and that the mortuary fund contributed
by the members who should thereafter join the consolidated as-
5 sociation should inure to all the members, it was estopped to
refuse to levy an assessment on its members joining after the
consolidation, to pay beneficiaries of a member of the former
association, on the ground that the contract was *ultra vires*.

ADVANCES BY REINSURER: *Reimbursement*. Where a consolidated
1 mutual insurance association drew from its mortuary fund,
acquired before the consolidation, to pay death benefits of mem-
6 bers of the former association, it was entitled to apply assess-
ments levied on the former association's members to reimburse
the fund, as against the beneficiaries of former association
members.

PAYMENT OF DEATH LOSSES: *When application of trust property not
required*. Where a mutual insurance association, which had
issued certificates to its members requiring it to levy a per
1 capita assessment at a member's death, and apply the proceeds,
not exceeding two thousand dollars, to its beneficiaries, trans-
ferred its membership to defendant association under an agree-
8 ment that its members should be entitled to full rights as
members therein, the beneficiaries of a transferred member
were not entitled to compel defendant to apply property trans-
ferred to it in trust to carry out the terms of the agreement,
in the absence of proof that such application was necessary to
pay the beneficiaries' claim.

Appeal from Marion District Court.—HON. J. H. APPLE-
GATE, Judge.

FRIDAY, MAY 18, 1900.

PLAINTIFFS, the beneficiaries in a certificate of life in-
surance issued by the Iowa Masons' Benevolent Society to
Aaron D. Wetherell, now deceased, bring this action thereon
and upon a contract between said society and the defendant
whereby certain property and the membership of the society
were transferred to the defendant. The plaintiffs ask that
defendant account for assessments made and collected and
for the property; also that defendant be required to make
an assessment on all its members for the payment of plain-
tiff's claim, and that they have judgment against the defend-
ant for the full amount thereof, with interest. The issues

and decree will appear in the opinion. Both parties appeal. The defendant, having first appealed, is designated as appellant.—*Affirmed.*

Boies & Boies for appellant.

Ayres, Woodin & Ayres for appellees.

GIVEN, J.—I. There is no dispute as to the facts, and we will avail ourselves of the following concise statement thereof made by the defendant's counsel: "On the 8th day of October, 1887, the Iowa Masons' Benevolent Society,
1 a mutual benefit association, incorporated under the laws of Iowa, issued to Aaron D. Wetherell a certificate of membership in which plaintiffs in this action were named as beneficiaries. On the 24th day of June, 1896, the officers of said Iowa Masons' Benevolent Society and the officers of this defendant, Equitable Mutual Life Association, executed a certain instrument purporting to be a contract of consolidation between said Iowa Masons' Benevolent Society and this defendant, which is set out as Exhibit 2 of appellant's abstract (page 47 *et seq.*). It will be necessary hereafter to notice in detail certain of the provisions of this contract. The present action is brought upon the certificate of membership issued by the said Iowa Masons' Benevolent Society and the alleged agreement of this defendant, contained in such contract of consolidation, and plaintiffs ask judgment for two thousand dollars and interest, and that defendant be compelled to levy an assessment upon all its members, and to account for alleged trust funds in the hands of defendant, and for other relief. It is an undisputed fact that Aaron D. Wetherell, the person on whose life the certificate of the Iowa Masons' Benevolent Society was issued, was over seventy-seven years of age at the date of the execution and delivery of the alleged contract of consolidation, and that said Wetherell had not, prior to that date, been a member of this defendant. It is further undisputed that subsequently to

the making of such alleged contract of consolidation the defendant assessed the members of the Iowa Masons' Benevolent Society on certain claims for death losses in such society, and many of the members of the Iowa Masons' Benevolent Society, including the said A. D. Wetherell, paid such assessments. The defendant disbursed the mortuary part of the funds so derived from the membership of the Iowa Masons' Benevolent Society among the beneficiaries named in certificates of membership issued by that society upon which claims had accrued, and also advanced from its own mortuary funds, in order to pay the limit of liability on such certificates of membership, sums in the aggregate exceeding two thousand eight hundred dollars. Afterwards A. D. Wetherell died, and proofs of his death were furnished to defendant at about the same time proofs of death of three other members of the Iowa Masons' Benevolent Society were furnished. The defendant thereupon levied its assessment No. 4 upon the members of the Iowa Masons' Benevolent Society for the deaths of such four members of that society; and, for the purpose of reimbursing its own mortuary fund for the money theretofore advanced, also included in the same assessment the names of three of its own members upon whose certificates of membership in this defendant claims had accrued, thereby assessing the members of the Iowa Masons' Benevolent Society by its assessment No. 4 for four deaths in said Iowa Masons' Benevolent Society and three deaths in the defendant association. The defendant realized on this assessment for seven deaths from the members of the Iowa Masons' Benevolent Society about six thousand dollars, a certain per cent. of which, however, was expense fund under the by-laws of such society. The certificate of membership of the Iowa Masons' Benevolent Society upon which the action is brought did not provide for the payment to the beneficiaries of the proceeds of an assessment, but did require such society, in case of a claim accruing on the certificate, to pay to the beneficiaries named therein certain

amounts for each member of such society in good standing at the date of such death, the provision of the contract in this respect being as follows (plaintiffs' Exhibit 1, abstract 40): 'That the Iowa Masons' Benevolent Society * * * does promise and agree to and with the said Aaron D. Wetherell, to pay or cause to be paid to his children, Maria Cathcart and Frank D. Wetherell, equally * * * after due notice and satisfactory evidence of the death of the said Aaron D. Wetherell shall have been received at the office of this society, for every member, of the first division of this society at such death as follows: For every member of the first class, seventy cents; of the second class, eighty cents; of the third class, one dollar and five cents; of the fourth class, one dollar and sixty cents; provided, however, that the aggregate sum so to be paid by this society shall in no case exceed the sum of two thousand dollars.' The membership of the Iowa Masons' Benevolent Society, at the date of the death of A. D. Wetherell, was such, as shown by the undisputed evidence, that there was due from such society, under the provisions of the certificate hereinbefore quoted, the sum of one thousand seventy-five dollars and forty-one cents; that is, there were in the first division of said society at the date of the death of said Wetherell sixty-one members in the first class, two hundred and ninety-seven members in the second class, four hundred and eighty-six members in the third class, and one hundred and seventy-eight members in the fourth class. The defendant, prior to the commencement of this action, and after the execution of the alleged contract of consolidation, received from the Iowa Masons' Benevolent Society, under the provisions of such contract, a conveyance of certain real estate in the city of Oskaloosa, subject to mortgages thereon. The defendant tendered to plaintiffs the amount of money due to them under the contract of the Iowa Masons' Benevolent Society as above computed, and denied liability for any further amount. The court below entered a judgment against

the defendant for this sum, with interest, amounting in the aggregate to one thousand one hundred and thirty-six dollars and thirty cents, and ordered the defendant to make an assessment upon all its members who became such after the execution of the alleged contract of consolidation, and pay the proceeds derived therefrom to the plaintiffs. The defendant complied with the judgment of the court to the extent of paying to the plaintiffs the said sum of one thousand one hundred and thirty-six dollars and thirty cents and the costs of the action, and appeals from the order of the court requiring it to assess its members who became such after the date of the alleged contract of consolidation, and from all other portions of the decree. The plaintiffs appealed from the judgment and decree in so far as it was adverse to them." The contract of consolidation is important as showing the relations and rights of the parties, but it need not be set out at length, but simply such parts as are hereafter noticed.

II. The defendant's first contention may be summed up as follows: That Aaron D. Wethrell, deceased, being over sixty-five years of age at the time said contract of consolidation was entered into, could not, under the law,
2 become a member of the defendant association, and therefore neither the defendant nor its members are liable to the plaintiffs. It is not questioned but that, by the terms of the contract, the membership of the Masons' Society was transferred to and received by the defendant association as members thereof, and that defendant agreed to carry out the contracts between said members and the Masons' Society. The contract of consolidation contains the following: "And the members of the Iowa Masons' Benevolent Society by virtue of this contract become and are members of the Equitable Mutual Life Association, with all of their rights under their certificates of membership fully preserved to them, and subject to all the duties and liabilities provided for in their respective certificates of membership, and the subsequent by-laws and rules made by said Equitable Mutual

Life Association to govern and control the duties and liabilities of its members, except as hereinafter provided." It is further provided that said transferred members shall have the same rights and privileges in the election of directors of the defendant association as though they had been members thereof from the time they became members of the
3 Masons Society. The contention is based upon the provision in section 1767, McClain's Code, as follows: "No corporation or association organized and operating under this act shall issue any certificate of membership or policy to any person under the age of fifteen years, nor over the age of sixty-five years * * * and any certificate issued or assignment made in violation of this section shall be void." It is insisted that the transaction was, in effect, the same as if the defendant had, at the time of the consolidation, issued its certificate to Aaron D. Wetherell; but not so. The defendant never issued nor agreed to issue a certificate to Mr. Wetherell. It did not contract to insure him, but agreed to carry out an existing lawful contract of insurance. We do not think that the contract as to Mr. Wetherell was in violation of said section 1767.

III. Defendant insists that for other reasons the contract is *ultra vires*, and therefore void. Counsel, affirming their confidence in the claim already considered, pass this subject with a few citations to the effect that, in the absence
4 of legislative authority, contracts of consolidation have usually been held *ultra vires* and void. Let this be conceded, and also that there is no statute in this state authorizing such a consolidation, still we must look to the contract, and what has been done under it, to see whether the defendant is in position to assert such a plea. It is a contract whereby the defendant, a life insurance association, agreed, for a full and valuable consideration received, to perform the obligations of the insurer under its contract with Mr. Wetherell. It accepted the contract, received Mr. Wetherell into its membership in pursuance of it, made and

collected assessments against him as such member, and on notice of his death made and collected assessments from its members on account thereof. The defendant has taken to itself all the benefits of the contract of consolidation and the contract with Mr. Wetherell, and has thus far stood upon and performed said contracts except as to these beneficiaries in the particular in controversy. The law of estoppel seldom finds more frequent or fitting application than in cases like this. In 27 Am. & Eng. Enc. Law, 359, it is said: "And now the defense of *ultra vires* is very generally regarded by the courts as an ungracious and odious one, and it is very well settled that neither party to the contract can avail himself of such a defense when the contract has been fully performed by the other party, and he has received the full benefit of the performance and of the contract." At pages 363 and 364 it is further said: "Furthermore, the only justification for the plea of *ultra vires* by an individual sued upon a contract by a corporation is that the obligation is not mutual, as the other party—the corporation—would not be bound by it. But, when the contract has been fully performed by the corporation, the mutuality of the obligation becomes an immaterial question, for the reason that the other party can have no occasion to seek its enforcement. According to the weight of authority, a corporation may not avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the performance and the contract; and, conversely, if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation." This statement of the law is fully supported by the cases cited. The language of this court in *Matt v. Society*, 70 Iowa, at page 461, is peculiarly applicable. It is said: "We can hardly think that the defendant desires to insist upon its position. If it is true, as claimed, that the certificates which

it has issued, and which the holders have in good faith relied upon as a provision for their family in case of death, have no validity, and if the defendant has, since this defense has been set up, proceeded to make and collect assessments, thus falsely pretending to the certificate holders that the certificates are valid, while claiming in the courts of the state that they are not, proceedings in *quo warranto* should be instituted against the defendant at once. These certificates are not to be treated as valid for the purpose of collecting assessments and invalid for the purpose of escaping liability; and we are not prepared to say that grave consequences should not follow the act of all persons who have participated in the commission of the great wrong." So far as the Masons' Benevolent Society, the assured, and these beneficiaries are concerned, the contract of consolidation and the contract of insurance of Mr. Wetherell have been fully executed, and under the well-recognized rules of law in such cases the defendant should be held to perform its part. If the act required was wrong in itself, public policy might forbid its performance; but it is not wrong, but an act demanded by the plain rules of justice and equity. Counsel for defendant, assuming that the contracts are void, discuss other questions, which, in view of our conclusion that the contracts are valid, need not be considered. The court below required the defendant to assess its members who became such after the consolidation, and it is from this the defendant appeals, grounding its appeal upon the claim that the contracts were

5 void. The contract of consolidation provides: "But the mortality fund contributed by members who shall hereafter join said consolidated association shall inure to the benefit of all the members of the said parties hereto without discrimination." We have seen that the contracts are not void because of the age of Mr. Wetherell; therefore, if void for other reasons, they are void as to all the transferred members from whom the defendant has been regularly collecting assessments. If the defendant may repudiate its

contracts as to Wetherell, it may as to any of these. Surely, no court will sanction such injustice. Our conclusion is that upon defendant's appeal the decree should be affirmed.

IV. The plaintiffs on their appeal contend that the defendant had no right to reimburse itself for the two thousand eight hundred dollars advanced out of its mortuary fund to pay losses to beneficiaries in the Masons' Society out of assessments collected from that society, and that the same

should be applied to pay the plaintiffs and the other
6 losses for which they were assessed. The defendant

took this two thousand eight hundred dollars from its mortuary fund, acquired before the consolidation, to complete payments of benefits under the Masons' Society certificates. It borrowed from that fund, and had a right to pay it as it did. It was not a diversion of the fund, and the plaintiffs were not prejudiced by what was done.

V. Plaintiffs' next claim is that they are entitled to have an assessment levied upon all the members of the defendant association who were members at the time of the

death of Mr. Wetherell. A lengthy clause in the con-

7 tract in respect of the mortuary fund concludes as

follows: "But the mortality fund contributed by members who shall hereafter join said consolidated association shall inure to the benefit of all the members of the said parties hereto without discrimination." This inferentially excludes those who became members of the defendant before the consolidation, and such is the conclusion warranted by other parts of the contract.

VI. The contract of consolidation provides as follows:

"It is further agreed that the assets now held and owned by each of the said parties hereto respectively, except office fixtures, furniture, supplies, and printed matter, shall remain the property of the membership of the said party now owning the same, and shall be used for the benefit of such membership as provided in their contracts of insurance and by-laws of each respective association; that is, the mem-

bership at the time of this consolidation. The real estate of the Iowa Masons' Benevolent Society shall be legally transferred to the Equitable Mutual Life Association, Waterloo, Iowa, to be held in trust with full power and authority to sell and convey the same, and from the proceeds pay or cause to be paid claim or claims for which said property is placed in trust to secure; and any surplus or excess of the proceeds of sale shall be used for the purposes of said Equitable Mutual Life Association." The certificate under which plaintiffs claim is not a promise to pay a fixed sum, but a certain sum for each member of the classes named, not exceeding two thousand dollars. It does not appear that there is any necessity for resorting to the trust property to insure the plaintiffs all they are entitled to under the certificate. They have been adjudged and paid one thousand one hundred and thirty-six dollars realized from the assessment on the members of the Masons' Society, and are, as we hold, entitled to the proceeds of an assessment on those who became members of the defendant society since the consolidation. For aught that appears, this will give to plaintiffs all they are entitled to. Our conclusion is that the decree is correct, and it is affirmed on both appeals.—AFFIRMED.

RUTH BRIGHTMAN V. JOHN MORGAN *et al.*, Appellants.

111	481
140	313
142	504
142	505

Wills: ELECTION BY HUSBAND. Where a surviving husband not only filed an election to take under the will of his deceased wife, but received benefits under the will, and, though served with notice of the filing of a final report of the executrix and of her application for discharge, made no objection thereto, he will be deemed to have made an election.

Executions: UNADMEASURED DISTRIBUTIVE SHARE. The unadmeasured distributive share of the husband in his deceased wife's real estate is not subject to levy under an execution against him.

Appeal: PLEADING BELOW: *Estoppel*. Testatrix bequeathed her estate to her daughter, who was to care for her father during

his life; and the father elected to take under the will in lieu
1 of his rights at law. Suit was brought by the daughter to
2 enjoin a sale of the land under an execution against the father.
She contended on appeal that her father had no interest in the
land subject to execution, because of his election, and was
thereby estopped to set up a dower interest, but no estoppel
was pleaded in the trial court. *Held*, that, as there was no
plea of estoppel, the question could not be considered on appeal.

Appeal from Pottawattamie District Court.—HON. W. R.
GEEEN, Judge.

SATURDAY, MAY 19, 1900.

SUIT in equity to enjoin the sale of certain lands under
execution in favor of one Bomboy. From a decree for plain-
tiff, defendants appeal.—*Affirmed*.

Roscoe Barton for appellants.

Cullison & Turner for appellee.

DEEMER, J.—In September of the year 1886, Bomboy
obtained judgment against one J. W. Lackey. Elizabeth
Lackey, wife of J. W. Lackey, died testate in February of
the year 1889, seised of two hundred and forty acres of land.
By the terms of her will, she devised her property, both real
and personal, to her daughter, Ruth Brightman. The
1 will also reads as follows: "I also desire and expect
that my daughter, Ruth Brightman, will furnish my
beloved husband, John Wesley Lackey, a good, comfortable
home, and with all the necessaries of life suitable to his
condition, age, and standing in life, and treat him kindly
and affectionately, and care for him in sickness, and provide
for him medicines and medical attendance during his life,
and give him a respectable and commendable burial after
his death. I desire that he accept the provisions of this will
in lieu and instead of all other rights he has to my property
under the law." Ruth Brightman was appointed executrix

of the will, and proceeded to act as such until her discharge, in May of the year 1890. Notice of the terms of the will was given to J. W. Lackey, and on October 26, 1891, eight months after the same was made, he filed with the clerk of the courts an election to take under the will. No other or further record was made of this election. The daughter (plaintiff) has collected the rents of the farm, and for two years after the death of Mrs. Lackey she and her father made their home on the land. Plaintiff contends that her father has no interest in the land subject to execution, for the reason that he filed an election to take and accept the benefits

of the will; and, second, because his distributive share
2 has never been admeasured. There is no plea of estoppel. Hence that question cannot be considered.

Golden v. Hardesty, 93 Iowa, 622; *Glen v. Jeffrey*, 75 Iowa, 29; *Jackson v. Lynn*, 94 Iowa, 151. The statute (Code, 1873, section 2452) in force when the will was probated reads as follows: "The widow's share cannot be affected by any will of her husband unless she consents thereto within 6 months after notice to her of the provisions of the will by the other parties interested in the estate; which consent shall be entered on the records of the court." This section has been held applicable to the share of the husband in the wife's estate. *Shields v. Keys*, 24 Iowa, 298. While no record of the surviving husband's election to take under the will was made, yet such an election may become effective, although not entered of record. *Craig v. Conover*, 80 Iowa, 358; *Pellizzarro v. Reppert*, 83 Iowa, 497; *In re Franke's Estate*, 97 Iowa, 707. In *Craig v. Conover*, *supra*, it is said, "If the record discloses an act or declaration of the widow plainly

indicating a purpose to take under the will, she will
3 be held to have so elected." In the case at bar the surviving husband not only filed an election, but he received some of the benefits under the will, and although served with notice of the filing of the executrix's final report, and of her application for discharge, made no objection

thereto, but, in effect, consented to her discharge and to the settlement of the estate. Under the authorities before cited, this should be held to constitute an election. Aside
 4 from this, however, there was nothing on which to levy execution until the distributive share was set aside or admeasured. *Rausch v. Moore*, 48 Iowa, 611; *Getchell v. McGuire*, 70 Iowa, 72; *Purcell v. Lang*, 97 Iowa, 610. It may be that an execution plaintiff has a remedy in equity to subject the husband's unassigned interest in his deceased wife's real estate, but that point need not be determined, for there is no prayer in defendant's answer for such relief.

Treating J. W. Lackey as a co-tenant with plaintiff, it may well be doubted whether a levy on his undivided one-third interest is of any validity. *Starr v. Leavitt*, 2 Conn. 246; *Staniford v. Fullerton*, 18 Me. 229; *Lawrence v. Burnham*, 4 Nev. 368; *Smith v. Knight*, 20 N. H. 17; and Code, sections 3977, 3978. Our conclusion is that the decree of the district court is right, and it is AFFIRMED.

HENRY WILBERDING, Appellee, v. CITY OF DUBUQUE, Appellant.

Injury by Defective Sidewalks: EVIDENCE. In an action against the city for injuries caused by a defective sidewalk, it is not error
 2 to admit testimony of a witness as to others having also tripped and fallen over loose boards in the sidewalk; such evidence being offered solely on the question of notice to the city of the defective condition of the walk.

PERMANENCY OF INJURY: *Future pain and suffering.* Where, in a suit against the city for injuries caused by a defective sidewalk, the evidence shows plaintiff's injuries to be probably
 4 permanent, and that he would suffer therefrom at times, the jury may consider future pain and suffering, if any, and the probable permanency of the injuries under the evidence, and allow the plaintiff compensation therefor.

111	484
113	650

111	484
115	275

111	484
116	487

111	484
119	58

111	484
128	249

Instructions: CONFLICT IN EVIDENCE: *Equivalents.* Where, in a suit against the city for injuries caused by a defective sidewalk, defendant requests an instruction that, if the only defect was merely a loose plank which was only out of place occasionally, it must have been observable by all passers-by, for
3 such a length of time that the city, in the exercise of ordinary care, would have discovered it in time to repair it before plaintiff's accident, it is not error to refuse such instruction; the evidence as to the condition of the walk being conflicting, and the court having fully and properly instructed thereon.

DIRECTING JURY AFTER RETIREMENT: *Invading province of jury.* Where, in an action against a city for injuries caused by a defective sidewalk, the jury, after retiring, propound to the court the question whether the existence of a defective sidewalk for five months, daily traveled by city officials and all classes of people, would constitute presumptive notice to the
5 city of its defective condition, and the court answered that it would, and then repeats a former instruction that, where a defect has existed for such a length of time that city officials should have discovered it in the use of ordinary care and diligence, the law presumes notice to them thereof, the answer as a whole, and in connection with the question, is not erroneous as an invasion of the province of the jury

New Trial: MISCONDUCT OF JUROR. Statements of a juror in a personal injury case as to the condition of the sidewalk
1 claimed by plaintiff to be defective, made to his fellow jurors after the final submission of the cause, from what he claims is his own knowledge, constitutes misconduct justifying a new trial.

SAME. In an action for injuries against a city, it is not error to refuse the defendant a new trial because a juror stated in the jury room, after the final submission of the case, that the
6 city had settled another case of one thousand eight hundred dollars; the statement not seeming to have received any attention from the other jurors, and not being shown to have prejudiced the city.

PRESUMPTION AS TO MISCONDUCT. Where jurors are cautioned as to
7 their duties, no presumption arises that the caution has been disregarded.

Appeal from Dubuque District Court.—HON. FREDERICK O'DONNELL and HON. JAMES L. HUSTED, Judges.

SATURDAY, MAY 19, 1900.

ACTION to recover damages for personal injury caused by a defective sidewalk. There were two jury trials. The first resulted in a verdict for the defendant, which was set aside, and a new trial ordered. The second jury found for the plaintiff. Judgment was rendered on the verdict. The defendant appeals from the final judgment.—*Affirmed.*

Duffie & McGuire for appellant.

Longueville, McCarthy & Kenline for appellee.

SHERWIN, J.—The first verdict in this case was for the defendant. It was set aside upon plaintiff's motion, and a new trial ordered. Exception was saved to the action of the trial court, but no appeal was ever taken from that order, and, when the appeal was taken from the final judgment, more than six months had elapsed since that order was made. The appellant assigns error in the granting of a new trial, and the appellee contends that the city waived any objection it might have urged to the order by going to trial the second time, and by not appealing therefrom.

That the order granting a new trial is one from which an appeal could have been taken is not questioned. Whether the appellant can now complain thereof we need not determine in this case, because it clearly appears from the record that the verdict was properly set aside.

The motion for a new trial, following the first verdict, set out twenty-three principal and a dozen subgrounds upon which it was asked. It was sustained generally. We cannot in this opinion review all of these grounds. We

1 find that the court might well have based its action upon the alleged misconduct of the juror Stewart, who stated to his fellow jurors, while in the jury room, what he claimed to be facts within his personal knowledge relating to the sidewalk in question. In other words, he

appears in the dual capacity of a juror and a self-constituted witness for the defendant. The precise effect his positive and reiterated statements may have had upon the minds of his fellow jurors we are not required to determine. That they were given some weight, and may have affected the verdict, is apparent from their nature. His misconduct was prejudicial, and warranted the trial court in setting aside the verdict. *Hall v. Robinson*, 25 Iowa, 91; *Kruidenier v. Shields*, 70 Iowa, 429; *Griffin v. Harriman*, 74 Iowa, 436.

The petition alleges that the sidewalk between Langworthy avenue and Reeder street, opposite to the property of one Florey, was originally constructed of decayed material, and uneven and irregular boards, and became loose; worn, and rickety, and the boards loose and out of place, and that the plaintiff stepped and tripped on the loose board which caused his fall and the injury complained of. Upon the second trial the court permitted several witnesses to testify as to their having tripped and fallen over the same board prior to plaintiff's injury. This evidence was offered and received solely on the question of notice to the city of the condition of the walk, and has been held competent for that purpose. *Smith v. City of Des Moines*, 84 Iowa, 685; *Hunt v. City of Dubuque*, 96 Iowa, 314; *Frohs v. City of Dubuque*, 109 Iowa, 219. In the earlier cases in which the court held similar evidence not admissible it does not appear that the evidence was offered for the purpose herein stated, and the court does not seem to have had this precise thought in mind. See *Frohs v. City of Dubuque*, *supra*. Other complaints are made as to the admission or rejection of testimony, but a careful examination of the record convinces us that no prejudicial error appears.

The defendant asked the court to instruct the jury that if the only defect in the walk was merely a loose plank,

which was only out of place occasionally, it must have been observable by all passers over said walk for such a
3 length of time that the city, in the exercise of ordinary care, would have discovered said loose plank in time to repair it prior to the plaintiff's accident. The allegation of the petition that the walk for some distance along where the accident occurred was unsound and in a dangerous condition was supported by the evidence for the plaintiff. The defendant's witnesses testified that the general condition of the walk was good, and that there were no loose boards in it. The general condition of the walk might have been such that the city would be charged with notice of the particular defect causing the injury. *Armstrong v. Town of Ackley*, 71 Iowa, 75. The court refused the instruction asked, and in clear and concise language instructed the jury on this issue as it was presented by the pleadings and by the evidence. The instructions given announced the correct rule, as laid down in *Rice v. City of Des Moines*, 40 Iowa, 638; *McConnell v. City of Osage*, 80 Iowa, 293; *Munger v. City of Waterloo*, 83 Iowa, 559; and there was no error in refusing those asked.

The appellant also assigns error in the instruction relative to future suffering and the permanency of plaintiff's injury. The jury was told that it might consider
4 "future pain and suffering, if any, and probable permanency of injury, under the evidence." The undisputed evidence was that the injury was probably permanent in its nature, and that plaintiff would suffer therefrom at times. The jury was told to be governed in the matter by the evidence, and to allow the plaintiff just compensation for his injuries. We think the jury could not have misunderstood their duty under this instruction, and that it was not prejudicial to defendant. *Stafford v. City of Oskaloosa*, 64 Iowa, 251.

After retiring with the case, the jury submitted to the court the question whether the existence for five months of a defective sidewalk which had been daily traveled over by city officials and all classes of people, would constitute presumptive notice to the city of its defective condition. The court answered the inquiry in the instruction following: "In answer to your written request, you are instructed that where a defective sidewalk has existed for such period of time as mentioned by you, and it is a defect observable and apparent to the ordinarily careful traveler over the same, the law presumes notice to the city, whether such defect was reported to the city or its officers or not. As before instructed, when a defect has existed for such a length of time that the officers of the city should have discovered the defect if they had exercised ordinary care and diligence, then the law presumes notice to them whether the defect had been reported to them or not, and whether they actually knew it or not." It is contended that the court invaded the province of the jury in this instruction. Circumstances may be shown under which the city would be charged with negligence as a matter of law. The question propounded by the jury embodied facts which would perhaps warrant such holding. The court's answer was expressly based upon the hypothesis presented in the question, and in addition thereto reiterated the rule on the subject which had already been given. Taken as a whole, and in connection with the question, we think it was not prejudicial to the defendant. *Rosenberg v. City of Des Moines*, 41 Iowa, 415; *Baxter v. City of Cedar Rapids*, 103 Iowa, 559; *Hazard v. City of Council Bluffs*, 87 Iowa, 51.

While in the jury room one of the jurors made the statement that the city had settled another case with a woman for one thousand eight hundred dollars. It is not shown that the city was in any way prejudiced by this statement. It did not concern any matter in

controversy in the case at bar, and does not appear to have received any attention from the other jurors. It was not error to refuse a new trial on account thereof.

The evidence wholly fails to sustain the claim of a quotient verdict, and we discover no reversible error in the court's examination of the individual jurors on that question. It was certainly proper for the court to ascertain the very truth of the matter for his own guidance, and this was what he sought.

There was no prejudicial error in the argument of
7 counsel. The jury was at the time cautioned as to its duties, and no presumption arises that the caution was disregarded. The judgment of the district court is AFFIRMED.

LIZZIE HULBERT V. NEW NONPAREIL COMPANY, Appellant.

Libel: MITIGATION: *Evidence.* Where a reporter, in writing up
1 the proceedings in a seduction case, based his article on information received over the telephone, and on a note the justice left on the reporter's desk, and through mistake published the name and address of an innocent party as the complaining witness, the justice's docket was properly excluded
2 when offered by defendant, in mitigation of damages for libel, since neither the reporter nor the publisher saw the docket prior to the publication.

EXEMPLARY DAMAGES: *Jury question.* The question of exemplary damages was properly submitted to the jury, since it was their
6 province to say whether the action of the defendant showed such a want of care as to constitute malice.

DAMAGES: *Jury question.* Where plaintiff's name and address
1 were published as that of the complaining witness in a seduction case, in an article reporting the proceedings, which were in fact brought by another party, thereby falsely imputing
4 want of chastity to plaintiff, an instruction that the law presumes damage and legal malice in such a case, and the verdict should be for the plaintiff, and the only question for the jury to determine was the amount of such damages, was proper, since the publication was both actionable and false.

REPORTING JUDICIAL PROCEEDINGS: *Privilege*. Where a reporter,
1 without seeing the justice's docket, in writing up the pro-
ceedings in a seduction case, published that plaintiff was the
3 complaining witness, an instruction that such publication
was not privileged because it reported a judicial proceeding
was proper, since the reporter identified plaintiff as the com-
plaining witness at his peril, when the record showed it was
another party.

PLEADING: *Settlement and satisfaction*. Where in an article re-
porting a seduction case, the name and address of plaintiff
were given, through mistake, as those of the complaining
5 witness, and on the following day the paper published an ex-
planation, evidence that the correction was satisfactory to
plaintiff was properly excluded, even without objection made,
as it was immaterial on the question of damages; neither
settlement nor satisfaction being pleaded.

Appeal from Pottawattamie District Court.—HON. W. R.
GREEN, Judge.

SATURDAY, MAY 19, 1900.

PLAINTIFF brings this action to recover damages for
an alleged wrongful, wicked, malicious, unlawful, reckless,
and careless publication in the *Nonpareil* (a daily news-
paper) of the following concerning her, which, she charges,
is false and defamatory: "Charged with Seduction. Frank
D. Shaffer, the liveryman on North Main street, was ar-
rested yesterday afternoon on an information filed in Jus-
tice Vien's court by Lizzie Hulbert, a dressmaker residing
at No. 728 First Avenue, charging him with seduction.
According to Miss Hulbert's complaint, Shaffer accom-
plished her ruin, under promise of marriage, about the 1st
of April last. She also accuses him of being the father of
her child, which is dead. Shaffer gave bonds in the sum
of three hundred dollars, and by consent of both parties
the hearing of the case was set for Wednesday, November
18th, at 2 p. m." The defendant answered, admitting the
publication, and alleging certain facts in justification and
in mitigation of damages. The jury found specially that

the plaintiff is not entitled to exemplary damages, and returned a verdict in her favor for two hundred and fifty dollars. Judgment was rendered on the verdict and the defendant appeals.—*Affirmed.*

Mayne & Hazelton and *Frank H. Gaynor* for appellant.

Harl & McCabe and *N. A. Crawford* for appellee.

GIVEN, J.—I. There is but little, if any, controversy as to the facts, which are, in substance, as follows: On and prior to the eleventh day of November, 1896, the plaintiff, an unmarried woman, resided at No. 628 First avenue in the city of Council Bluffs and was engaged in business as a dressmaker. The New Nonpareil Company is a corporation and was then engaged in the publication of a daily newspaper, of general circulation, called "*The Daily Nonpareil*," and on said eleventh day of November published the article set out in the petition, under the following circumstances: On the tenth day of November, 1896, one Lizzie Herbert filed an information before Ovide Vien, a justice of the peace, charging Frank D. Shaffer with having seduced her. On the eleventh day of November, Frank Froom, a reporter for said paper, was informed that the charge had been made and warrant issued against Shaffer, and as soon as the arrest was made he would be furnished with further particulars. That evening Justice Vien left a slip of paper on Mr. Froom's desk, "stating that Frank Shaffer, the North Main street liveryman, had been arrested on information charging him with seduction, by Lizzie Hulbert." Mr. Froom examined the city directory, and found the name and address of the plaintiff, and, understanding that Emmet Tingley was an attorney in the case, asked him by telephone if the complainant was Lizzie Hulbert, the dressmaker, and if it was the

one living at the address given in the directory (naming it). Mr. Tingley answered that he thought it was. Thereupon Froom wrote the article, and it was published. On the fourteenth or fifteenth of November the plaintiff called at the Nonpareil office, and, satisfying those in charge that she was not the complainant against Shaffer, the following was published in the next issue of the *Nonpareil*: "The Shaffer Case: The case against Frank Shaffer, brought by Lizzie Herbert, in which she charges him with seduction, will be heard by Justice Vien next Wednesday. By mistake in the name as originally given in the information, it was stated that the prosecuting witness was Miss Lizzie Hulbert, the dressmaker. An injustice was therefore done the latter unintentionally, the information having been misleading."

II. Defendant's first complaint is that the court erred in sustaining plaintiff's objection to the entry in the justice's docket in the case against Shaffer offered by the defendant. Plaintiff, in a denial of defendant's abstract, denies that said entry was offered in evidence, and, as
2 this denial stands unquestioned we must accept it as correct. If it was otherwise, there was no error in the ruling, as it appears that neither the writer nor publishers of the article ever saw the docket entry before the publication was made.

III. The court instructed as follows: "There is no dispute in the case but that the article in question was published by the defendant, and that, in so far as it referred to the plaintiff, it was untrue. The defendant claims that the article was privileged; that is, that it had a right to publish the same, whether true or false, by reason of its being the
3 report of a judicial proceeding. There was, however, nothing in the legal proceedings or in the information furnished by the justice that identified the plaintiff as being the prosecuting witness in the so-called Shaffer case. When, therefore, the defendant did so iden-

tify her in the article in question, it did so at its peril, and, the statements with reference to the plaintiff having turned out to be false, the plea of privilege cannot avail the defendant." The defendant complains that this excluded the claim of privilege. It certainly does, and correctly so, we think, under the undisputed facts of the case. It was the privilege of the defendant to publish the proceedings had before the justice, as shown by the files and docket in the case against Shaffer; but it was not privileged to add thereto, as was done, that which was false, if thereby another was injured. The defendant was not privileged to publish that the complaint was made by "Lizzie Hulbert, a dressmaker residing at No. 728 First avenue," as such was not the fact, and was not so shown in the proceedings before the justice. To publish a libelous charge that is false, against another, is never privileged, when the falsehood originates with the publisher, whatever may be the rule when it originates otherwise. There is no error in the instruction..

IV. The court instructed to the effect that words which imputed to a female want of chastity were libelous *per se*, and that, if the statements were false, damage is presumed, and that the article in question contains such an imputation, and, so far as it relates to the plaintiff, is false,

and instructed as follows: "You are therefore instructed that the law presumes, in the absence of evidence to the contrary, that plaintiff was damaged in her feelings and her reputation, and that in publishing the article in question the defendant was actuated by legal malice. It follows from this that your verdict in this case must be for the plaintiff, and that the only question for you to determine is the amount of her damage." The defendant quotes and complains of the last sentence, and contends that malice is the gist of the action; that it is for the jury to determine whether the publication was malicious; that,

unless malice is shown, there can be no recovery; and that in this instruction the court usurped the province of the jury. The publication being actionable and false, damage and legal malice are presumed, and in such case the plaintiff is entitled to recovery in some amount. If actual malice is shown, it goes, not to the right to recover, but to the amount of damages, and it is always a question for the jury. We think the instruction is correct.

V. Mr. Bender, business manager of the *Nonpareil*, testified as to the interview with the plaintiff at the time of her visit to the office. He testifies that she said that confusion was likely to arise, and had arisen very frequently, and that she did not wonder that an error had been made, and wished a correction to appear in the paper; that, upon being told the circumstances, he says: "I told her that the correction would be cheerfully made. She said, if such correction were made, it would be perfectly satisfactory to her." The court, without objection being made, struck out the statement as to its being satisfactory, and as to the likelihood of such mistakes occurring. The question then asked the witness to state what was said with reference to the retraction of the article, and with reference to its being satisfactory, to which plaintiff objected as incompetent and immaterial, which objection was sustained. The
5 ruling was correct. Neither settlement nor satisfaction was pleaded. What is alleged as to the correction is not pleaded as a complete defense, but in mitigation of damages. Again, there was no consideration for the alleged satisfaction. It was the duty of the defendant to correct the error. That the correction was made was admitted in evidence on the question of damages, and for that purpose it was immaterial whether or not the plaintiff was satisfied with the correction.

VI. Defendant complains that the court submitted the question of exemplary damages to the jury, and insists that

the jury should have been told that the defendant was not to blame, and that the most plaintiff could ask was her actual damages. While the jury was fully warranted in finding specially, as it did, that plaintiff was not entitled to exemplary damages, yet that was a proper question to be submitted to them. It is not for the court to say whether further inquiry as to the identity of the person complaining against Shaffer should have been made or not. It was for the jury to say whether greater care should have been exercised, and whether there was such a want of care as showed malice. We find no error in either of the respects urged, and the judgment of the district court is therefore AFFIRMED.

STATE OF IOWA V. O. GARBROSKI, Appellant.

Constitutional Law: PEDDLER'S TAX: *Exemption of Union soldiers from.* Under Constitution, article 1, section 6, providing that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Code, section 1347, requiring all peddlers plying their vocation outside of any city or town to secure a license from the county auditor, and to pay a tax therefor, but specially exempting from the payment of such tax persons who have served in the Union army or navy, is unconstitutional and void, as an unreasonable classification.

Appeal from Mahaska District Court.—HON. D. RYAN, Judge.

SATURDAY, MAY 19, 1900.

THE defendant was accused and convicted of peddling in the county, outside of a city or incorporated town, without a license from the auditor, and appeals.—*Reversed.*

111	496
112	469

111	496
128	112

111	496
130	579

111	496
131	135
131	141
131	147
131	148
131	387

111	496
138	741

Byron W. Preston and H. H. Sheriff for appellant.

L. C. Blanchard, James Carroll and Milton Remley, Attorney General, for the State.

LADD, J.—The evidence tended to show that defendant peddled goods in Mahaska county, outside of any city or town, without first having obtained a license from the county auditor so to do. He asserts that, even though the evidence may have warranted his conviction, the statute under which the prosecution was had is in contravention of the constitution of the state. Section 1347 of the Code reads: "Peddlers plying their vocation outside of a city or town shall pay for the use of the county an annual tax of ten dollars; those with a vehicle drawn by one animal, twenty-five dollars; those with four or more animals, seventy-five dollars. But the board of supervisors of any county may remit the tax where it is deemed that the articles to be sold are of an educational nature, or where the parties desiring to peddle are, because of age or infirmity, incapacitated for manual labor. Nothing in this section shall be held to apply to parties selling their own work or production, either by themselves or employes, nor to persons who have served in the Union army or navy, or to persons selling at wholesale to merchants, nor to transient venders of drugs." The particular point made is that, as it grants immunity from the tax to peddlers who served in the army or navy of the United States during the Civil War, it is in conflict with section 6 of article 1 of the constitution. That section reads: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens." That this statute grants a privilege to persons who have served in the Union army and navy, not available to others, is manifest. It is the

privilege of plying the vocation of peddling outside of cities and towns without the payment of the annual tax exacted from others. This is not dependent on a present situation or condition, nor on relations or circumstances suggesting the necessity or propriety of different legislation for the exempted class. The authorities generally recognize that, for the purposes of efficient and beneficial legislation, it is often necessary to divide the subjects upon which it operates into classes. As said by Justice Field in *Railway Co. v. Mackey*, 127 U. S. 205 (8 Sup. Ct. Rep. 1161, 32 L. Ed. 107). "The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application." The extent to which division may be carried without running into special, or what is known as "class" legislation, is sometimes difficult to determine. All the authorities agree that the distinction in dividing may not be arbitrary, and must be based on differences which are apparent and reasonable. Thus, the supreme court of Minnesota, in *Nichols v. Walter*, 37 Minn. 262 (33 N. W. Rep. 800), declared: "The true, practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason,—some reason suggested by necessity; by such a difference in the situation, and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." This was approved in *Lavallee v. Railway Co.*, 40 Minn. 249 (41 N. W. Rep. 974). In *Johnson v. Railway Co.*, 43 Minn. 222 (45 N. W. Rep. 157, 8 L. R. A. 419), the same court, through Mitchell, J., said: "It has sometimes been loosely stated that special legislation is not class, if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions." In *State v. Hammer*, 42 N. J. Law, 439, the su-

preme court of New Jersey held that: "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." The supreme court of Tennessee, in *Sutton v. State*, 96 Tenn. 696 (36 S. W. Rep. 697, 33 L. R. A. 589), very tersely states the law to be that legislation, to be constitutional and valid, "must possess each of two indispensable qualities: *First*, it must be so formed as to extend to and embrace equally all persons who are or may be in the like situation or circumstances; and, *secondly*, the classification must be natural and reasonable, and not arbitrary or capricious." To the same effect, see *State v. Loomis*, 115 Mo. 307 (22 S. W. Rep. 350, 21 L. R. A. 789); *State v. Haun*, 61 Kan. 146 (59 Pac. Rep. 341); *State v. Goodwill*, 33 W. Va. 179 (10 S. E. Rep. 286, 6 L. R. A. 621); *Ex parte Jentzsch*, 112 Cal. 468 (44 Pac. Rep. 803, 32 L. R. A. 665); *City of Evansville v. State*, 118 Ind. Sup. 426 (21 N. E. Rep. 267, 4 L. R. A. 93); *Magoun v. Bank*, 170 U. S. 283 (18 Sup. Ct. Rep. 594, 42 L. Ed. 1037. In the last case, Justice McKenna, speaking of the equal protection of the laws required by the fourteenth amendment to the constitution of the United States, said: "It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both

in the privileges conferred and the liabilities imposed." The same court, speaking through Justice Brewer, in *Railway Co. v. Ellis*, 165 U. S. 150 (17 Sup. Ct. Rep. 255, 41 L. Ed. 666), declared that "the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

It will be observed that while the language of the courts differs somewhat, there is no controversy concerning the rules which govern in determining what legislation is inhibited by the constitution as class. The difficulty arises in their application. No unvarying test of likeness or unlikeness of conditions and circumstances can well be laid down. Nor is this desirable. Necessarily, much must depend on the facts of each case. The classification here attempted rests solely on a past and completed transaction, having no relation to the particular legislation enacted. All citizens are divided into two classes,—those who served in the army and navy thirty-five years ago, and all those who did not. True, as suggested, the veterans came from no particular class; but the trouble with this statute is that it attempts to make of them a class in legislation, in the operation of which there can be no substantial distinction between them and others. In present conditions and circumstances, there are no differences between them, in their relation to society and the administration of the law, and other citizens of the state. Possibly a veteran soldier or sailor would be preferred, everything else being equal, for civil office, because of superior fitness, resulting from discipline of service in war; for "it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state." But the work of a peddler calls for no qualities such as a soldier or sailor acquires in the service. Equality in right, privilege, burdens, and protection is the thought running through the constitution and laws of the state; and an act intentionally and necessarily creating inequality therein, based

on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government, and expressly prohibited by the constitution. If the ultimate object of this section was, as suggested, to prevent the separation of society into classes or castes such as exist in other lands, it may not be amiss to observe that these, in large part, had their origin in the honors and emoluments bestowed because of achievements in arms and military service. *In re Keymer*, 148 N. Y. 219 (42 N. E. Rep. 667, 35 L. R. A. 447), the court of appeals of New York, in holding that veterans might not, under the constitution of that state, have preference to certain appointments in the civil service, regardless of qualifications, as provided by statute, said: "In the first place, this act refers only to veterans of the Civil War, and creates a favored class. The veteran who seeks a place in the civil service, where compensation does not exceed four dollars per day, is exempted from competitive examination, while every other citizen must submit to it. This is contrary to the letter and spirit of the constitution, and renders the act void." In *Brown v. Russell*, 166 Mass. 14 (43 N. E. Rep. 1007, 32 L. R. A. 253), the supreme judicial court of Massachusetts gave the negative answer to this question: "Can the legislature constitutionally provide that certain public offices and employments which it has created shall be filled by veterans, in preference to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments?" See *Sewickley School Dist. v. Osburn School Dist.*, 19 Pa. Co. Ct. R. 257; *In re Sweeley*, 33 N. Y. 369. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are declared to be entitled to different privileges, under the same conditions. It is then that discriminations may be said to impair

that equal right which all can claim in the operation of the laws. *Soon Hing v. Crowley*, 113 U. S. 703 (5 Sup. Ct. Rep. 730, 28 L. Ed. 1145). In requiring the license fee from one class of persons for peddling in the country not exacted from another following the same vocation, there was unwarranted discrimination, rendering the statute void. It undertakes to grant to certain citizens or classes of citizens privileges or immunities that on the same terms do not belong to all. The constitution aims at equality of rights, privileges, and capacities, and the state has no favors to bestow, except such as, from the nature of the case, cannot be possessed and enjoyed by all. As said by Judge Cooley: "Privileges may be granted to particular individuals, when by so doing the rights of others are not interfered with; but every one has the right to demand that he be governed by general rules, and a special statute which singles his case out, to be regulated by different laws from those that are applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government. Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor,—for the favorite at court and the countryman at the plow." Cooley, *Constitutional Limitations* (6th ed.), section 482. Or, as declared in *State v. Goodwill*, 33 W. Va. 179 (10 S. E. Rep. 285, 6 L. R. A. 623): "The right of every individual must stand or fall by the same rule of law that governs every other member of the body politic, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not all others, when there is no public necessity for such discrimination, is unconstitutional and void." The classification attempted by this statute is based on no apparent necessity, or difference in conditions or circumstances that have any relation whatever to the em-

ployment in which the veteran of the Civil War is authorized to engage without paying license. It savors more of philanthropy (worthy of the highest commendation, in its proper sphere) than of reasonable discrimination, based on real or apparent fitness for the work to be done.—REVERSED.

THE GEISER MANUFACTURING COMPANY, Appellant, v.
HENRY KROGMAN AND FERDINAND KROGMAN.

Foreclosure and Sale of Chattels: STIPULATIONS AS TO DAMAGES AND NOTICE: *Law by contract.* Where a chattel mortgage provides
1 that the mortgagee may take possession and sell the property at public sale without any liability for damages, the mortgagee is not liable, in the absence of bad faith, at least,
6 for selling the property at an advertised public sale, which was not in accordance with Code, sections 4275, 4277, prescribing the methods to be pursued in the sale of mortgage chattels, the provisions of the mortgage constituting a waiver of strict compliance with the statute, and a judgment for the defendant for damages for such sale was erroneous.

BURDEN OF PROOF. When a chattel mortgage authorizes the mortgagee to take possession and sell the mortgaged property at a public sale whenever he deems himself insecure, and the property is so seized and sold, the court should instruct, in an
7 action between the mortgagor and mortgagee, that the burden is on the mortgagor to show that the sale was not made in good faith, and it is error to require the mortgagee to prove, in the first instance, that he deemed himself unsafe when he foreclosed. This is especially so where no issue was made challenging the maturity of the mortgage debt.

Appeal: OVERRULED DEMURRER: *Pleading over.* While overruling a demurrer to an answer is not an adjudication and the
2 matters covered by such ruling may thereafter be presented in other ways, yet when, after such ruling, the party interposing the demurrer pleads over he waives the error in the ruling and cannot base an assignment of error upon it.

REVIEW OF INSTRUCTIONS. Where a requested instruction which was
4 refused is abstractly correct, but refers to evidence which is not in the record, it will not be considered on appeal.

111	503
113	346
110	503
115	335
111	503
116	503
111	503
122	135
123	338
123	395
111	503
136	626

ASSIGNMENTS. Assignments of error based on evidence which is
3 not in the record cannot be considered.

SAME: *How specific.* Under Code, section 4136, requiring an assignment of error to clearly indicate the very error complained of, and requiring the points in a demurrer, motion, instructions or rulings on which the party relies to be separately stated, an assignment that "the court erred in overruling plaintiff's motion in arrest of judgment and for a new trial, and
5 the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 10th grounds of such motion, in that the verdict is contrary to law, to the evidence; damages are waived; the instructions are wrong; that the verdict is the result of prejudice, and plaintiff's motion to direct a verdict should have been sustained,"—will not be considered, since it is too general to present any error for review.

Appeal from Osceola District Court.—HON. F. R. GAYNOR,
Judge.

SATURDAY, MAY 19, 1900.

ACTION on three promissory notes made and executed to plaintiff by defendants Krogman. Defendants admit the making of the notes, but plead an offset and counterclaim growing out of the sale of certain property under a mortgage given to secure the notes. There was a trial to a jury, resulting in a verdict and judgment for defendants and plaintiff appeals.—*Reversed.*

John McLennan and T. D. Hastie for appellant.

Milt H. Allen for appellees.

DEEMER, J.—On motion of appellees the evidence has been stricken from the record and we may only consider such of the assignments of error as arise upon the pleadings, the instructions, the verdict, and the judgment. It appears from the pleadings that on the fifth day of January the defendants made and executed to plaintiff their three promissory notes in writing for the sum of four hundred and ninety-one dollars and sixty-six cents each, due, one December 1, 1897,

one December 1, 1898, and one December 1, 1899, each bearing seven per cent. interest. To secure these notes the defendant also executed a chattel mortgage on a traction engine and a separator that contained these, among
1 other provisions: "Until default in payment of the above notes, * * * said mortgagor may remain in possession of said * * * chattels, * * * but, if such default be made, or if said mortgagee, * * * with or without apparent cause, feel insecure, then the said mortgagee shall have the right to declare all the above notes due, and may, without suit, take possession of the * * * chattels, * * * and sell the same at public sale without any liability for real or supposed damages; and at such sale the Geiser Mfg. Co. may become the purchaser, and said mortgagee may retain the amount of said note or notes and all the expenses, * * * and apply net proceeds as mortgagee may elect, and pay the surplus to said mortgagors." June 25, 1897, plaintiff took possession of the mortgaged property, and sold the same at public sale for the sum of eight hundred dollars, it being the purchaser. From the amount of the bid it deducted the sum of thirty-five dollars, and credited the balance on the three notes hitherto mentioned. Defendants filed an answer and counterclaim consisting of six divisions. The first was an admission of certain facts recited in the petition. The second was a claim that the amount charged as expense, to-wit, thirty-five dollars, was exorbitant, and that five dollars was a reasonable price. The third charges that when plaintiff took possession of and sold the mortgaged property nothing was due on the notes, and that plaintiff did not feel itself insecure, and had no reason for declaring the indebtedness due; that in taking possession of and selling the property plaintiff acted maliciously, and with intent to wrong defendants, and that by reason of the said sale defendants were damaged in the sum of five hundred dollars in being deprived of the use of the machine; and they asked the further sum of one thousand dollars.

as exemplary damages. In the fifth division they pleaded as a separate defense that plaintiff, in selling the property under the mortgage, bid in the same at a wholly inadequate price, and wrongfully and fraudulently and with intent to cheat took no steps to procure bidders, or to procure a fair price for the property, and by reason thereof damaged defendants in the sum of one thousand one hundred dollars. In the fifth division they alleged that prior to the execution of the notes in suit defendant executed other notes to plaintiff for the purchase price of the separator included in the mortgage, and they asked that plaintiff be required to produce the notes in order that the damages awarded them on their counterclaims might be applied on said notes, and they asked that, after allowing the amount claimed, they have judgment for the sum of one thousand two hundred dollars. A demurrer to these divisions of the answer was filed by the plaintiff, but the same was overruled, and thereafter defendants added a sixth division to their counterclaim, in which they charged by way of further counterclaim that at the time plaintiff took possession of and sold the property no part of the debt was due, and plaintiff had no reason for believing itself insecure; that in taking possession of and selling the property plaintiff acted maliciously, and with intent to cheat, wrong, and defraud the defendants; that it sold the property to itself at an inadequate price, and took no steps to procure bidders, or to secure a sale at a fair price; that, though there were no bidders aside from itself at the sale, it failed to postpone the sale, and wrongfully and fraudulently sold the property for an inadequate price; that, after becoming a purchaser at its own sale, it resold the property for about one thousand nine hundred dollars, and thereby obtained a profit of about one thousand one hundred dollars, for which sum they asked judgment. By subsequent pleading defendants amended division 3 by stating that plaintiff neglected to give proper notice of sale of the mortgaged property, and failed to conduct the sale as required by law, in that they did not

serve notice on the mortgagors, failed to have the property appraised, and failed to post notices of sale. They also amended the fourth division of their answer by reciting the same facts, and charged that failure to give notice, etc., was in pursuance of the plaintiff's wrongful and malicious intent. They also amended the sixth division of their answer by reciting the same facts as set forth in the amendment to the fourth division. The prayer remained the same. Plaintiff then demurred to the sixth division of the answer and counterclaim, and to the amendment to which we have last referred, but the demurrer was also overruled. Thereafter plaintiff filed a reply denying all the material allegations of the different divisions of the answer; further pleading that the mortgaged property was taken by an agent under specific instructions to take the property; and that if he (the agent) acted maliciously, or wantonly injured defendants, it was beyond the scope of his employment, and plaintiff is not bound by his acts. It also denied malice, and pleaded advice of counsel, and that, when the defendant Henry Krogman purchased the machinery, he was the owner of one hundred and sixty acres of land, that he afterwards sold to his wife for the purpose of defrauding plaintiff. It also pleaded an estoppel that need not be further noticed. On these issues the case was tried to a jury, resulting in the verdict hitherto mentioned.

It will be noticed that each affirmative defense or cause of action in the counterclaim was stated in a distinct division of the answer, and purported to be sufficient in itself. This was as the statute requires, and we refer to the matter at this time in order that what follows may be better understood. By pleading over after the ruling on its demurrer, plaintiff waived the error, if any. *Frum v. Keeney*, 109 Iowa, 393. The rulings did not constitute an adjudication, however, and the same questions may be presented in other ways. See same case. The assignments of error in the overruling of the demurrer cannot be considered.

The fourth, fifth, sixth, eighth, ninth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth assignments cannot be considered, for the reason that they each and all depend on the evidence, and it is not in the record.

The eighth relates to an instruction asked by plaintiff, that was refused, bearing on the question of malice. Abstractly considered, the instruction is correct. But it makes reference to the evidence, and we cannot determine its correctness without having that evidence before us.

The tenth reads as follows: "The court erred in overruling plaintiff's motion in arrest of judgment and for a new trial, and in overruling the 1st, 2d, 3d, 4th, 5th, 7th, 8th, 9th, and 10th grounds of said motion, in that the verdict is contrary to law, to the evidence; damages are waived; the instructions of the court are wrong; the verdict is the result of prejudice, and plaintiff's motion to direct a verdict should have been sustained." The statute (Code, section 4136) provides, in substance, that an assignment of error must clearly and specifically indicate the very error complained of, and, among several points made in a demurrer, motion, instructions or rulings the one or these relied upon must be separately stated. Under the statute, as heretofore construed by this court, this assignment is not sufficiently specific. See *Calkins v. Railway Co.*, 92 Iowa, 714; *Morris v. Railroad Co.*, 45 Iowa, 29.

The seventh assignment of error calls in question the correctness of an instruction asked by plaintiff to the effect that, as the defendants agreed in their mortgage to waive all damages, both real and supposed, for or by reason of a foreclosure thereof, they were not entitled to recover. Of this more hereafter. The eleventh challenges two instructions given by the court to the effect that plaintiff was liable for conversion of the property because it failed to take steps required by sections 4275, 4277, of the Code, relating to

the foreclosure of chattel mortgages; for the reason that the mortgage provides for the sale of property without notice, and for the further reason that the parties agreed that defendant should not claim damages. The twelfth assignment challenges certain instructions wherein the jury was directed to determine whether or not the notes sued on were due, and also to determine whether or not plaintiff did feel itself insecure. These assignments present the only questions for determination, although the arguments have covered a very much broader field. We have then, first, the validity and effect of the stipulations found in the mortgage, providing that the mortgagee might take possession and sell the property at public sale "without any liability for real or supposed damages." From the allegations of the pleadings there is no doubt that the sale was public, and that advertisement thereof was given; and there is also no question but that the sale was not made in accordance with the statute. But that statute, in effect, provides that the parties may stipulate for a foreclosure without giving the statutory notice. See Code, section 4273; *Gibson v. McIntire*, 110 Iowa, 417; *Gear v. Schrei*, 57 Iowa, 666; *Denny v. Van Dusen*, 27 Kan. 437; *Johnston v. Robuck*, 104 Iowa, 523. That a party of full age, and acting *sui juris*, can waive a statutory, or even a constitutional, provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy, is a well-settled principle of law. *Phyfe v. Eimer*, 45 N. Y. 104; *Embury v. Conner*, 3 N. Y. 511; *Kneetle v. Newcomb*, 22 N. Y. 249 (78 Am. Dec. 186). In what respect, if any, is the contract in question violative of public policy? It relates simply to defendants' property rights, and no principle of public policy is involved. It is, in effect, a waiver of any damages, real or supposed, resulting from the seizure and sale of the property at public auction. That plaintiff had the right at any time it saw fit to take the property, and sell the same at public auction, is conceded; but defendants'

counsel contend that it could not do so without following the statutory method of foreclosure. The court so instructed the jury. The question of right to sell without notice, and the effect of a good-faith public sale in accordance with the terms of the instrument, was not submitted, or, if it was, the jury was instructed, in effect, that the sale made without the giving of the statutory notice was invalid, and amounted to a conversion of the property. In this, we think, there was error: *First*, because defendants agreed not to claim damages if the plaintiff took the property, and sold the same at public auction; and, *second*, because it is apparent from a reading of all the provisions and conditions of the mortgage that the parties agreed to a foreclosure by sale at public auction without following the statutory provisions. The agreement not to claim damages, construed with the other provision, clearly indicates that sale might be made at public auction without following the statute with reference to foreclosure. We have no occasion, in this connection, to determine the question of good faith. The court eliminated this element from the case in its instructions, and held, in effect, that the sale must, in any event, have been in accordance with the statutes. That an agreement not to claim damages is valid where no question of public policy is involved. See *Griswold v. Railway Co.*, 90 Iowa, 265; *Richmond v. Railroad Co.*, 26 Iowa, 191; *Sutherland Damages* (2d ed.) section 6; *Lee v. Tillotson*, 24 Wend. 337. The maxim, "*Modus et conventio vincunt legem*," applies where no question of public policy or fraud is involved. Where no rule of law or principle of public policy is involved the parties may, by contract, make a law for themselves. From what has already been said, it is apparent that we do not agree with the trial court in its view of the law regarding the giving of statutory notice of foreclosure. Consideration of the whole instrument clearly indicates that the mortgagee had the right to take possession of the mortgaged property, and to sell the same at public sale in the ordinary man-

ner; and, in view of the clause waiving damages if the sale was so conducted, defendants can claim nothing for the failure to give the statutory notice. Nothing further need be said on this point.

No issue seems to be made regarding the maturity of the notes, yet the court instructed that plaintiff must prove that it felt itself insecure in order to establish the maturity thereof. Neither good faith nor malice was referred to, and the burden placed on plaintiff was to prove a state of mind existing at the time the property was sold. It seems to us this was error. There is no doubt that plaintiff took possession of the property, and sold it at public sale. This made a *prima facie* case for the plaintiff, and it was not required to make further proof. Defendants admitted that plaintiff took possession of and sold the property; hence there was no conflict in the evidence on this proposition. In any event, the court should have instructed that plaintiff had made out a *prima facie* case, and that the burden was then on the defendants to show that the notes had not matured. *Wells v. Chapman*, 59 Iowa, 658; *Richardson v. Coffman*, 87 Iowa, 127. The argument, as we have said, covers a multitude of questions, but none, aside from those we have discussed, are properly raised. For the errors pointed out, the judgment is REVERSED.

W. O. CLEMAN'S *et al.*, Appellants, v. ALICE R. PENFIELD
et al.

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114	516

Divorced Woman: HOMESTEAD RIGHTS. A woman without children, to whom, on the granting of a divorce to her, the homestead of herself and divorced husband was deeded, pursuant to an agreement of the parties that if the decree was granted she should have the property for alimony, has not, though occupying it, any homestead rights therein, prior to her subsequent marriage; Code 1873, section 1989, providing that a *widow* or *widower*, though without children, shall be deemed a family while continuing to occupy the house used as a homestead at the time of the death of the husband or wife.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

SATURDAY, MAY 19, 1900.

PLAINTIFFS, judgment creditors of Alice R. Penfield, bring this action in equity to have their said judgments decreed to be a lien upon the premises described, and for special execution. The defendants claim that said property is exempt, as a homestead. The issues will sufficiently appear in the opinion.—*Reversed.*

Jamison & Smyth for appellants.

Giffin & Voris for appellees.

GIVEN, J.—I. There is no dispute as to the material facts, the substance of which is as follows: Alice R. Penfield was the wife of B. A. Allen, with whom she resided alone on the property in question, as their homestead, they having no children. The defendant Alice brought an action for divorce and alimony against B. A. Allen, and pending the action it was agreed between them that in case a decree of divorce was granted she should have the property in question, in full of alimony; and thereupon Mr. Allen executed a deed for said property to her, dated March 9, 1895, and deposited it with her attorneys in said divorce case (being these plaintiffs), to be delivered to her when the decree of divorce was granted. A decree of divorce was granted March 28, 1895, and, thereupon said deed was delivered to her, and placed of record. She continued to occupy said premises as her own until her marriage with the defendant H. Penfield, which occurred some time after the divorce was granted; and since their marriage, they two have occupied the property as a homestead. On February 9, 1897, A. R. Penfield conveyed said property to her husband, H. Penfield, for the recited consideration of three thousand five hundred dollars;

but he testifies that the real consideration was his agreement to pay an incumbrance of six hundred dollars on the property, and to put it in repair. On June 18, 1897, these plaintiffs recovered a judgment against Alice R. Penfield in the superior court of Cedar Rapids for two hundred dollars, for services as her attorneys in said divorce case; the original notice in said action having been served on the seventeenth day of February, 1897,—two days before the execution of said deed to H. Penfield. On June 17, 1897, M. T. Gleason recovered a judgment in said superior court against B. A. Allen and Alice R. Penfield for one hundred dollars and costs, on their promissory note, dated February 8, 1890, for borrowed money used to repair said premises. These judgments are unsatisfied, and were both owned by the plaintiffs at the commencement of this action. Neither of these judgments was ever transcribed to the district court, so as to become a lien on real estate.

II. We are in no doubt but that the deed to the defendant H. Penfield was made to him to hinder, delay, and defraud the plaintiffs in the collection of said judgments, and therefore hold it to be void as to them. The remaining contention is whether the defendant Alice R. Penfield is entitled to hold this property exempt as a homestead, as against these judgments. She had a homestead right in the property up to the time the divorce was granted, because it was owned by her husband, and was occupied by them, as a family, as their homestead. By the divorce they became as strangers to each other, as single persons, and the family ceased to exist. Mrs. Penfield, then a single woman, without children, was residing alone on the property from the time the divorce was granted until her remarriage. During that period she was not the head of or a member of a family. There being no children, there was no family. The property lost its homestead character at the time of the divorce, because of the dissolution of the family, and because it was

not thereafter occupied as such until Mrs. Penfield's remarriage. It was as though Mr. and Mrs. Allen had abandoned the homestead. On the marriage of Mr. and Mrs. Penfield, and their occupancy of the property, the homestead character attached, not because of anything that had preceded, but because of their marriage and occupancy. It seems to us quite clear that, during the interim between the granting of the divorce and the marriage of Mr. and Mrs. Penfield, this property was not a homestead, and that the homestead right now existing arose as a new and original right by reason of their marriage and occupancy. The debts for which these judgments were rendered accrued prior to the marriage of Mr. and Mrs. Penfield, and consequently prior to the attaching of the present homestead rights. It follows, therefore, that the property is not exempt as to these debts. Section 1989 of the Code of 1873, under which these transactions were had, provides as follows: "A widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as such at the time of the death of the husband or wife." Several cases are cited, arising under this section; but, as we view them, they are not in point, though, as said in *Woods v. Davis*, 34 Iowa, 264: "Yet they indicate the liberal spirit in which the provisions of the homestead law are to be construed in favor of those for whose benefit they were enacted." In that case the husband and wife were divorced, and custody of their minor children was awarded to the wife, with an order that she maintain them. After the levy of the attachment in that case they were remarried. This court said: "But this decree does not exonerate him from liability to support the child in the event of the inability of the mother to do so. It seems to fully accord with the provisions of the homestead law that the exemption should last so long as his liability for support exists, provided he continues in the actual possession of the property. Besides, the homestead law is intended for the benefit of the children as well as of the parents." The

grounds upon which the right of homestead was sustained are lacking in this case. By the present Code (section 2973) there is added to said section 1989, Code 1873, the following: "And such rights shall continue to the party to whom it is adjudged in the decree of divorce, during continued personal occupancy." Had this statute been in force at the time of the transactions under consideration, there could be no question but that, notwithstanding there were no children, the homestead would have continued to Mrs. Penfield. We think the agreement as to alimony has the same effect as a decree. It is urged that this change shows that such was the legislative intent under the prior statutes, but we think it rather indicates otherwise. If such was regarded as the law prior to the enactment of the present Code, there would have been no reason for the change.

Our conclusions are that, under the law as it stood prior to the present Code, the homestead right held by Mr. and Mrs. Allen was determined by the granting of the divorce, and the right abandoned; that the present right of homestead arose after the accruing of debts for which these judgments were rendered; and that the plaintiffs are entitled to have said judgments enforced as against this property. The decree of the district court is reversed, and the case remanded for decree in harmony with this opinion.—REVERSED.

RENNER BROS., Appellants, v. LEWIS THORNBURG AND
EZRA McLAIN.

111	515
117	620
111	515
118	562

Denial of Signature: CONSTRUCTION OF PLEADINGS: *Estoppel by requested instruction.* Where, in a suit on a note, defendant denies the genuineness of his signature, and plaintiff pleads ratification thereof in reply, it is not error to instruct that the jury must find that defendant either signed the note, or authorized the signature, or ratified and adopted it; defendant 8 having also denied authorizing the signature, and an instruction having been given, at plaintiff's request, that, if the de-

defendant did not deny or repudiate the signature when the note was presented for payment, the jury might infer that he had authorized it.

SAME: Evidence. Where, in a suit on a note, defendant denies the genuineness of his signature, it is not error to instruct that, before the jury could find that defendant ratified the signature in a conversation with plaintiff's witness, they should find from the evidence that defendant knew what note he was talking about; the pleading containing no admission that he knew and was talking about the note in suit, and the witness's testimony leaving the matter to inference.

REPETITION OF DENIAL. Where plaintiff sues on a note, and the defendant denies the genuineness of his signature thereto, under oath, and plaintiff then amends his petition by pleading defendant's ratification and adoption of the signature, and no copy of the note is attached or incorporated in the amendment, and the record shows that the amended petition was filed before the answer, it is not error to instruct that the burden of proving the genuineness of the signature is on the plaintiff, though defendant has also filed an unverified general denial to the amendment, since defendant is not required to repeat his verified denial of the genuineness of the signature.

INSTRUCTIONS: Jury not misled. Where, in reply to an answer denying defendant's signature to a note, plaintiff pleads certain facts as constituting an estoppel, and also pleads a portion of the same facts in an amended petition as constituting ratification and adoption of the signature and the court instructs that, as no evidence had been offered in support of the reply, the jury should disregard it, but also instructs fully and fairly on the issue of ratification, the instruction as to the reply is not erroneous, as leading the jury to believe that the facts pleaded therein could not be considered for any purpose, though the jury began a request for further instructions by an unfinished sentence to the effect that, "having failed to determine how much of the reply they should disregard," they request further instructions as to ratification and adoption.

PROVING STANDARD OF COMPARISON: Evidence. Where expert evidence is resorted to by defendant to prove his purported signature to the note sued on to be a forgery, defendant's testimony that he wrote the standards used for comparison, before the date of the forged instrument, is sufficient proof of the genuineness of the standards.

Appeal: OBJECTION BELOW. Where objection to another judge of the district, acting for the trial judge at the latter's request in

and adoption of the signature, and, this, defendant denied. There was a trial to a jury, resulting in a verdict and judgment for defendants, and plaintiffs appeal.—*Affirmed.*

E. G. Albert and Rose & Henderson for appellants.

Russell & Toliver for appellee McLain.

DEEMER, J.—To prove that the signature attached to the note purporting to have been made by defendant McLain was a forgery, he introduced experts, who compared it with others said to have been made by him, and gave as their opinion that the signatures were not written by the same
1 person. It is said that the standards used for comparison were not sufficiently proven. Defendant McLain testified positively that he signed the name appearing on the instruments that were claimed to be genuine, and five other witnesses who were familiar with his signature testified to the same thing. The signatures to these documents were appended before the one in question was executed, and there is no room for the contention that the standards were manufactured. We do not mean to hold that the genuineness of the standard may be proven by persons who have seen the party write. The standard itself must be established by evidence of a higher and more certain character. But there is no doubt that the party who wrote the signature may prove it by his own oath. Such evidence is the very best that can be offered. Nothing is then left to presumption. *Hyde v. Woolfolk*, 1 Iowa, 159; *Sankey v. Cook*, 82 Iowa, 125. There was no error in admitting the expert evidence.

II. In the first instruction the jury was told that the plaintiffs had not offered evidence in support of their plea of estoppel set forth in the reply, and that they should
2 disregard that claim. The reply to which this instruction relates pleads an estoppel based on the declarations of McLain after he knew of the exist-

ence of the note, and the conduct of plaintiffs with reference thereto. In part, it was based on the same state of facts as were pleaded in an amendment to the petition pleading ratification and adoption. It is not claimed that the court erred in refusing to submit the issue of estoppel, but it is insisted that, in view of the facts pleaded in the amendment to the petition, the jury was misled by this instruction; that it could not tell what the court meant by "estoppel," and was likely to understand from the instruction that none of the facts pleaded in reply could be considered for any purpose. Were it not for the fact that the court fully and fairly instructed on the issue tendered by the amended pleading, and explained the doctrine of ratification and adoption as applied to the evidence adduced, there would be much force in appellant's position. But, in view of the fact that the whole matter was fully covered, we do not see how the jury could have been misled. Plaintiffs contend, however, that a request from the jury for further instructions clearly shows that some of the members were misled by the instruction. That request was peculiar. It reads as follows: "We, the jury in the case, having failed to determine how much of the reply in plaintiffs' claim they should disregard (as stated in instruction one of the court)." This is followed by a special request for explanation of instructions 5, 9, 12, 18, and 19. The sentence was never completed, unless the request referred to made it complete, and it appears that the trial court never saw it. In itself, it is meaningless, and it is apparent that the jury started to make some kind of request, and then abandoned it, or embodied it in what followed. The request for further instructions relating to ratification and adoption was complied with, and there is no mistaking the fact that this issue was not taken from the jury. We do not think it was in any manner misled.

III. The court instructed that the burden of proving the genuineness of the signature was on the plaintiffs. This

is complained of. The original petition was in the usual form, and contained a copy of the note. Defendant, 4 in answer, denied the genuineness of the signature under oath. Plaintiff then filed an amendment to its petition, pleading ratification and adoption, and made the former petition a part by reference. Defendant filed a general denial in answer, but did not, in this answer to the amendment, deny the genuineness of the signature. In view of these facts, plaintiffs contended that the burden was on the defendant. We do not think so. The amendment virtually conceded that defendant had not signed the note. The genuineness of the signature was already denied under oath, and the amendment, conceding it to have been necessary, was to meet the issue thus tendered. Having once denied the signature under oath, defendant was not bound to renew his denial in every amendment. In view of this denial, the burden was on plaintiffs. Code, section 3640; *Bank v. Young*, 36 Iowa, 44. Moreover, if the amendment to the petition be treated as a separate and independent count, that must be complete and sufficient in itself. Defendant was not obliged to deny the signature under oath in order to shift the burden, for 5 the reason that no copy of the note was incorporated in or attached to the amendment. Again, the record shows that both the petition and amendment thereto were filed before defendant's answer denying the genuineness of the signature.

IV. Instruction 11 reads as follows: "Before you should find that defendant ratified the signature on said note, if you find he did not sign the note personally, and that his name was not signed on said note by his authority, you should find, from the evidence, that he knew 6 what note he was talking about." This is complained of because it is said that it is admitted in the pleadings and in the evidence that he knew about the note involved in this suit, and was talking about it. We

cannot agree with counsel in this contention. There is nothing in the pleadings containing such an admission as is claimed, and the party to whom it is claimed the admission was made left it to inference that defendant was speaking of the note in controversy. In any event, defendant McLain

denied the entire conversation, and it was as essential to prove the reference to the note in suit as to prove the statement itself. Moreover, the plaintiffs asked an instruction embodying practically the same thought, and they cannot be heard to complain.

V. The court instructed the jury that it must find that defendant signed the note, or that he authorized some one to sign it for him, or that after it was signed he ratified and adopted the signature thereto. This is said to be erroneous, because no claim was made that he authorized any one to sign for him. There are two answers to this proposition: The first is that defendant, in answer, not only denied the signature, but denied that he had given authority to anyone to sign for him; and the second is that plaintiffs asked an instruction to the effect that, if the defendant failed to deny or repudiate the signature when the instrument was presented for payment, the jury might infer that he had authorized some person to sign for him. This instruction was given as requested, and plaintiffs cannot be heard to say that the instruction referred to an issue not presented by the pleadings.

VI. It is said that the court should have instructed, as a matter of law, that defendant had ratified and adopted the signature. There was a dispute in the evidence on this proposition, and the question was properly submitted to the jury. Again, the plaintiffs asked that this issue be submitted, in their requests for instructions.

VII. The court gave what are known as instructions 20 and 21. Afterwards, and before verdict, these instruc-

tions were withdrawn. Very little, if anything, is said in favor of the instructions. They were clearly erroneous. But it is said that the manner of withdrawal was such as to demand a reversal. It appears that the case was tried before Hon. S. M. Elwood, as presiding judge, and that he gave the instructions to the jury. After the case was submitted, Judge Elwood left the town where the court was being held, and directed Judge Church, who was in town that day, and who had agreed to receive the verdict, to withdraw the two instructions, as he was convinced that they were erroneous. Pursuant to this direction, Judge Church recalled the jury, and, in writing, directed it that the instructions were withdrawn, and for it not to consider them. We know of no reason for holding this proceeding irregular. Everything was done as the statute directs, unless it be that the instructions were withdrawn by a judge other than the one holding the particular term. The judge who in fact withdrew the instructions was a judge in that particular district, and was authorized to hold the court then in session. What he did was by direction of the judge trying the case, and there is nothing to indicate any prejudice. The court did not change. It was the same court, although, for the time being, presided over by another judge. What was done was by the express direction of the judge trying the case. In any event, Judge Church had jurisdiction, and, as no prejudice resulted, plaintiffs cannot complain. *Reed v. Lane*, 96 Iowa, 454; *Mellinger v. Von Behren*, 53 Iowa, 374. The statutes (Code, sections 241, 3649) relied on by appellants relate to the trial of issues, and not to such proceedings as are here complained of. Moreover, the question here presented does not seem to have been raised in the trial court. No objection was there made to Judge Church's acting for Judge Elwood. As the matter is not jurisdictional, it cannot be presented to this court for the first time.

VIII. Complaint is made of the explanatory instruction relating to No. 5, theretofore given by the court, and of certain other explanatory instructions given at the request of the jury. They are too long to be set out
12 in an opinion, and, as they embody no new propositions we content ourselves by saying there was no error. They were, perhaps, more prolix than was necessary, but, as they were prompted by requests from the jury, we cannot say that they should not have been given.

IX. Lastly, it is said that the verdict is contrary to the evidence, and the instructions given by the court. There was a dispute in the evidence on every proposition, and we are not justified in interfering with the verdict. The
13 instructions are not as clear, perhaps, as they might have been, had they stated in concise and perspicuous language the exact matters in dispute, and the law to be applied thereto. But we are satisfied the jury was in no manner misled. Appellants' motion to strike an
14 amended abstract showing an entry of the trial court correcting the record after the appeal is overruled. An appeal from this ruling was necessary, to present the questions argued. Finding no prejudicial error, the judgment is AFFIRMED.

W. N. HALL, Appellant, v. IOWA CENTRAL RAILWAY COMPANY, Appellee.

Railroads: NEGLIGENCE: Jury question. The mere fact that a little dust and grease appeared on the top of the steam chest of an engine after a run of thirty miles, causing defendant's brakeman's foot to slip, was not sufficient evidence of negligence to warrant the submission to a jury of defendant's liability for injuries sustained by the brakeman.

Appeal from Mahaska District Court.—HON. BEN MCCOY, Judge.

MONDAY, MAY 21, 1900.

ACTION for personal injury. The court directed a verdict for the defendant. Plaintiff appeals.—*Affirmed.*

G. W. Lafferty and *B. W. Preston* for appellant.

L. C. Blanchard and *G. W. Severs* for appellee.

SHERWIN, J.—The plaintiff, at the time of his injury, November 25, 1894, was a head brakeman on one of defendant's freight trains. When his train left Oskaloosa on this day his conductor told him to head the train in on one of the side tracks when they reached Grinnell. As the engine neared the switch to one of these tracks, the plaintiff went through a front cab window out onto the running board along the side of the engine, and in stepping from the running board to the steam chest his foot slipped on the steam chest, and he was thrown to the ground, and severely injured. The train at the time was running at the rate of from four to five miles an hour. The sole complaint made by the plaintiff in argument is that the defendant negligently permitted the top of the steam chest to become dirty, greasy, and slippery, and thereby furnished a dangerous and unsafe place for the plaintiff to work. The only evidence bearing upon the condition of the steam chest is that after the plaintiff fell a little grease and dirt were noticed thereon. The condition of the engine when it left the roundhouse this morning is not shown, nor is it shown whether the dirt and grease on the steam chest as it then appeared was unusual, or that it could have been avoided by the use of reasonable and ordinary care. That oil is necessary for the operation of a ponderous track engine is known to all, and that the running of a heavy train over the road in dry weather raises much dust and dirt is equally as well known. The mere fact alone that a little dust and

grease appeared upon the top of the steam chest of this engine after a run of thirty miles, hauling a train of twenty-three cars, did not furnish sufficient evidence of negligence on the part of the defendant to warrant the court in submitting the case to the jury. In the case of *McFall v. Railway Co.*, 96 Iowa, 723, relied upon by the plaintiff, there was evidence tending to show that the water spout and the tank were out of repair, and leaky for that reason. There is nothing in this case even tending to show that the engine was not properly cleaned, or that its working condition was not perfect. It also appears conclusively that the plaintiff, in going out upon the engine as he did, was acting voluntarily, and without even the knowledge of the conductor that he was so doing. There were steps from the cab of the engine which would have furnished a safe way for him to reach the ground. He knew this, and still, of his own volition, he adopted an extremely dangerous way, and by so doing received the injury complained of. It is possible that the question of his contributory negligence, under the rule laid down in *Whitsett v. Railway Co.*, 67 Iowa, 150, ought to have gone to the jury, if there had been sufficient evidence on the other question. It is not necessary that we determine this, however, for our conclusion as to the defendant's negligence disposes of the case. It is **AFFIRMED**.

KATE HENDERSON, Appellee, v. MARY M. HARPER, Foreign Guardian, Appellant.

Foreign Guardian of One Insane: **TRANSFER OF PERSONAL PROPERTY IN IOWA TO.** Where a stepmother of an insane person, with whom such person lived after death of his father, and with whom he removed to Nebraska after her re-marriage, and remained, was appointed guardian of such person in Nebraska, and, after the filing of a petition in Iowa by his adopted sister asking appointment of a guardian of his estate, filed a certified copy of her bond as foreign guardian, and application for

transfer to her of his personal property, under Code, sections 3216-3218, authorizing a foreign guardian to receive personal property of a ward on the filing of a certified copy of the bond given in the state making such appointment, it was error to dismiss such application, since such foreign guardian stood in the position of *loco parentis* to the ward, her domicile being his domicile, and no substantial reason appeared why she should not care for his property.

Appeal from Clarke District Court.—HON. H. M. TOWNER,
Judge.

· MONDAY, MAY 21, 1900.

· APPEAL from an order dismissing the application of Mary M. Harper, the foreign guardian of J. M. Holcomb, asking for the transfer of funds belonging to him.—*Reversed.*

W. S. Hedrick for appellant.

James Rice for appellee.

SHERWIN, J.—In April, 1898, the appellee herein filed, in the district court of Clarke county, a petition asking for the appointment of a guardian of the estate of J. M. Holcomb, who, it is alleged, was a person of unsound mind owning property in said county. In July, 1898, the appellant filed an application in which she set forth her appointment as the guardian of J. M. Holcomb in the state of Nebraska in April, 1898, and asked that his personal property then situated in Clarke county be transferred to her. Her application was denied, and the court appointed a permanent guardian, as prayed by appellee. Both parties concede the mental disability of J. M. Holcomb from birth. The appellee is a sister by adoption; the appellant is his stepmother, to whom his father was married in 1881. In 1887 his father died, and in March, 1897, the appellant married her present husband, David Harper. J. M. Holcomb lived with his father, Cyrus Holcomb, and the appellant up to the time

of his father's death. After that, and up to the time of her marriage in 1897, he resided with appellant on property left by his father, in which, as we understand it, both had an interest. Immediately after her marriage to Mr. Harper, in 1897, appellant moved to Nebraska, to his home. J. M. Holcomb went with her, and has since remained there. Previous to their removal to Nebraska, no guardian had ever been appointed for J. M. Holcomb. He had joined appellant in the conveyance of property, as we gather from an imperfect record, in which his interest was one thousand dollars. Mrs. Harper collected three hundred dollars of this money, and the remaining seven hundred dollars is all the property he has in Clarke county, and is the sum the appellant asks to have transferred to her under section 3216 of the Code, which says: "Foreign guardians of nonresidents may be authorized by the district court, or judge thereof, of the county wherein such ward has personal property, to receive the same upon complying with the provisions of the following sections." Section 3217 provides for the filing of a certified copy of the bond given in the state of Nebraska, which was done. Section 3218 provides: "Upon the filing of the bond as provided and the court or judge being satisfied with the amount thereof, it shall order the personal property of the minor to be delivered to the guardian, and the clerk shall spread the bonds and receipt upon the records, and notify by mail the court granting letters of guardianship, of the amount of property allowed to the guardian and the date of the delivery thereof." As we have already seen, J. M. Holcomb has been a member of the appellant's family since her marriage to his father, in 1881, and ten years of this time has been since his father's death. The interest of the appellee in his welfare seems to have arisen recently, and, in fact, since his removal to Nebraska; for during the period subsequent to his father's death she does not appear to have been in any way concerned about his person or property. No substantial reason is shown why the appellant

should not care for his property as well as his person. He has long been a member of her family, and, in fact, has never had any other home than with her since her marriage to his father, twenty years ago. When she became a resident of Nebraska, in the spring of 1897, he went there with her, and as a member of her family. She may be said to stand in the position of *loco parentis* to him, and her domicile is his domicile. Schouler, Domestic Relations, section 230. The probate court of Nebraska had jurisdiction to appoint a guardian for him in that state, and under the rule announced *In re Benton*, 92 Iowa, 202, we find no reason in the record for refusing the transfer of his property to the foreign guardian.

It is contended, however, that his estate will be lost to him if transferred to the appellant; but, as was said in the *Benton case, supra*: "We do not regard this as a material point," for a certified copy of the bond filed by the guardian in Nebraska was filed in the district court of Clarke county, "and appears ample to protect the ward's interests." We think the fund in question should have been transferred to the appellant guardian as prayed.—REVERSED.

ANNIE M. HARVEY V. THE CITY OF CLARINDA, Appellant.

Negligence: DEFECTIVE HIGHWAY: *Jury question.* It is not negligence, as a matter of law, for one to use a highway having a defect in it.

PROXIMATE CAUSE: *Co-operating negligence.* The fact that in producing an accident the fright of plaintiff's horse operated with the negligence of defendant city, consisting in the narrowness of an embankment, used as an approach to a railroad crossing, the precipitate character of the banks, and the absence of railings, does not prevent defendant's negligence from being a proximate cause of the accident, and rendering it liable therefor.

STATUTES: *Construction.* Code, section 1051, requiring notice within thirty days to a city of injury from a defective street,

111	528
113	304
111	528
118	422
111	528
124	450
111	528
126	205
126	735
111	528
137	646
111	528
143	308
144	263

being found in chapter 14 relating to cities under special charter, and having been adopted by the same general assembly as the first section of such chapter (Code, section 933), expressly providing that the provisions of the chapter shall apply only to cities acting under special charter, cannot be construed to apply to other cities.

Requesting Instructions. In the absence of request, a failure to give an instruction relating to the burden of proof is not error.

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

MONDAY, MAY 21, 1900.

ACTION at law to recover damages for injuries received by plaintiff while driving along one of the streets in defendant city. The defendant demurred to the petition, and its demurrer being overruled, it filed an answer denying the allegations of the petition. The case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

H. E. Parslow and Smith McPherson for appellant.

J. R. Good and T. E. Clark for appellee.

DEEMER, J.—Defendant is a city of the second class. While driving along one of the streets of that city, plaintiff was thrown from the vehicle in which she was riding, and received the injuries of which she complains. The accident occurred August 24, 1898, and plaintiff commenced her action November 19, 1898. The demurrer was on the ground that the action was barred because no written verified statement of the claim was presented to the city council within thirty days after the plaintiff received her injury, as required by section 1051 of the Code. That section requires a written verified statement of the amount, nature, and cause of the injury, and of the time and place where the injury

occurred, to be presented to the council or filed with the clerk within thirty days after the alleged injury was sustained. It is found in chapter 14 of the Code, relating to cities under special charters; and the first section of that chapter (section 933 of the Code) expressly provides that the provision of the chapter shall apply only to cities acting under special charters. With this plain declaration of legislative intent, there is no room for construction. If the section relied on were found in a chapter headed as this one is, there might be room for argument, but with this plain expression of legislative purpose found in the first section of the chapter, considered in connection with the thought that both sections were adopted by the same general assembly, there is no room for interpretation. The demurrer was properly overruled.

II. Defendant contends that its alleged negligence was not the proximate cause of the injury. The jury was authorized to find the following facts: Main street, which is one of the principal ones of the city, intersects the right of way of the Chicago, Burlington & Quincy Railroad in the eastern part of the city. At such intersection there are two ways for crossing the railroad track,—one by means of an underground crossing, and the other by what is called a “grade crossing.” The railroad track at the point in question is seven and three-tenths feet above the ground level of the street, necessitating an elevated approach either side of the track. This approach is made of dirt. It is one hundred and forty-four feet in length on the west side of the railroad track, and seventeen feet in width at the narrowest point. Immediately west of the west rail of the track it is forty feet in width, but the crossing itself is but seventeen feet wide. The crossing is planked in the ordinary manner. For the first one hundred feet the rise is two and sixty-five-hundredths feet in one hundred, and four and sixty-five-hundredths feet in the remaining forty-four. Between this approach and the north line of the

street is the entrance to the underground crossing, and the slope between the driveways at the point where plaintiff received her injuries is thirteen feet wide. The approach has no railings or barricades of any kind. On the evening of the day in question, plaintiff was driving east on Main street, intending to cross the railway tracks by the grade crossing, and when her horse had about reached the west rail of the tracks he suddenly turned to the north, and kept on turning until he had the buggy to which he was attached faced westward. Just after he turned and started towards the west, the wheels on the north side of the buggy reached the sloping ground of the approach, causing the buggy to tip to the north, and plaintiff to be thrown therefrom. The alleged negligence is the width of the embankment, the precipitous character of the banks, and the absence of railings or barriers. It is conceded that neither party is at fault or responsible for the horse's turning, and it is also agreed that, after he commenced to turn, plaintiff was free from negligence; but it is contended on behalf of defendant that

3 it was not bound to provide against such accidents, and that, conceding its negligence, still the court ought to say, as a matter of law, that this negligence was not the proximate cause of the injury. There are some cases which hold that a city is not bound to anticipate such accidents, that it is not bound to provide against any use of its streets not contemplated in ordinary travel, and that, if the person injured is not at the time using the streets for the ordinary purposes of travel, he cannot recover. We have not fully adopted this rule. Of course, the city is not bound to do more than guard against ordinary contingencies, or those which might reasonably be apprehended. In other words, it is not an insurer against all accidents, and it is responsible only when it fails to use reasonable care to keep its streets in reasonably safe condition for public travel. But if it fails in this, and injury results, not due to want of ordinary care on the part of the person injured, it is

responsible. The mere fact that the driven horse is frightened or is temporarily unmanageable is not in itself conclusive. Now, the jury evidently found that defendant was negligent, and with that finding we cannot interfere; but should we say that this negligence was not the proximate cause of plaintiff's injury? Ordinarily, proximate cause is for the jury, and we see nothing in this case that takes it out of the ordinary rule. The fact that the horse, by reason of its disposition or habit, turned around on the embankment, is not controlling, unless plaintiff was in some manner responsible therefor. It is conceded, however, that she was not. The question for the jury was, then, would the accident, have happened had defendant used the care required of it? It goes without saying that if, notwithstanding the use of proper care on defendant's part, the accident would still have happened, there could be no recovery. But that question, as we have said, was for the jury. In the case of *Walrod v. Webster County*, 110 Iowa, 349, we had occasion to consider the effects of the fright of a horse being driven over a county bridge, on the issue of proximate cause, and there followed the rule theretofore announced in *Gould v.*

Schermer, 101 Iowa, 582, and other like cases,
4 wherein it is held that the mere fact that some other cause operates with the negligence of defendant to produce the injury does not relieve the defendant. His original wrong, with some other cause for which neither is responsible, and both operating proximately at the same time in producing the injury make him liable. That case also distinguishes *McClain v. Incorporated Town of Garden Grove*, 82 Iowa, 235, relied on by appellant. The rule in Massachusetts, and perhaps some other New England states, differs from ours. See *Marble v. City of Worcester*, 4 Gray, 395. But the great weight of authority is with us. See cases cited in *Walrod v. Webster County*, 110 Iowa, 349. The instructions given by the court fairly submitted the question of proximate cause, and we should not

interfere with the verdict. See *City of Atlanta v. Wilson*, 59 Ga. 544 (27 Am. Rep. 396).

III. The further point is made that plaintiff was guilty of contributory negligence. Ordinarily that, too, is a question for the jury. It was submitted in this case, and a finding of no contributory negligence returned. We are asked to hold that, as a matter of law, plaintiff was guilty of negligence contributing to her injury. Both ways
5 of crossing were open to plaintiff, as the defendant did nothing to indicate that the grade crossing was unsafe. By leaving the approach open to travel it impliedly invited the public to use it. Plaintiff had many times driven over both crossings, and was perfectly familiar with the situation. There also were other crossings that plaintiff might have taken to reach her destination, and she might have used the underground crossing. The jury was also authorized to find that there was nothing in the character or the disposition of the horse that made it negligent for plaintiff to drive the animal. Although there may have been a defect in the highway, it was not negligence, as a matter of law, for plaintiff to use the street. That question is settled by a long line of authorities. *Hoover v. Town of Mapleton*, 110 Iowa, 571; *Sylvester v. Town of Casey*, 110 Iowa, 256, and cases cited. Further, in this connection, it is said that the court erred in not instructing the jury that the burden of proof was
6 on plaintiff to excuse herself for not taking the safe crossing. Defendant asked no instructions relating to this subject and therefore cannot complain. The usual and proper instruction with reference to plaintiff's duty, if she knew the crossing she attempted to use was dangerous, was given, but nothing was said as to the burden of proof. In the absence of request, failure to give an instruction relating to the burden of proof is not erroneous. *Duncombe v. Powers*, 75 Iowa, 185; *Martin v. Davis*, 76 Iowa, 762.

We have considered all points argued, and find no error.
—AFFIRMED.

A. HENSEN, Appellant, v. W. W. BEEBE.

Sale: ACCEPTANCE. One to whom a corn harvester was delivered on a contract that if it worked well he should keep it, and pay
2 for it, accepts it by loaning it to another for use, and such other person using it, without the knowledge or consent of the seller.

Breach of Contract: DAMAGES: Instructions. Where the owner of waterworks used them for two years after their construction for him by a contractor, without any effort to remedy the defects therein, which were such as could have been readily remedied at moderate expense by moderate efforts, the court should, in an action for damages for such defects, have in-
1 structed as to what is meant by reasonable time, and that two years was more than a reasonable time in which to remedy the defects; and, though the instruction given correctly stated the law so far as it went, and no further instruction was asked, it was prejudicial, the jury being at liberty under it to allow damages for the entire two years.

SAME. Though there are defects in waterworks which a contractor has constructed, yet, they being such as not to render the works valueless, but such as might be readily remedied at a moderate expense by moderate efforts, he is not liable for
1 damages occurring therefrom after the owner had reasonable time in which to remedy them.

Appeal from O'Brien District Court.—HON. GEORGE W. WAKEFIELD, Judge.

MONDAY, MAY 21, 1900.

PLAINTIFF's petition is in three counts: The first, to recover ninety dollars and thirty-five cents balance for goods sold and delivered; the second, to recover a balance of ten dollars on a contract for putting in waterworks, and six dollars for repairing the same; and the third, to recover one hundred and thirty dollars for a corn harvester sold and delivered. The defendant answered, admitting seventy-one

dollars and five cents of the first count. Answering the second, he admits that he and plaintiff contracted that plaintiff should put in a system of waterworks for two hundred and ten dollars, that plaintiff attempted to do so, and alleges that the works were worthless for the purposes intended, because of certain defects specified. He denies that plaintiff made any repairs on said works subsequent to the erection thereof. To the third count he says the contract was that he should take the corn harvester, and if it worked well, he was to keep it, and pay one hundred and thirty dollars, and if it did not work well he would not buy it; that it did not work well; that he returned it to the plaintiff; that plaintiff refused to receive it, and that defendant placed it in a shed, subject to plaintiff's order, and so notified him. By way of counterclaim the defendant alleges that said waterworks were so constructed as to be wholly worthless as such, and so as to cause him damages. He alleges that the supply tank placed in his barn leaked, and injured his barn and grain; that plaintiff neglected to remove shavings and other accumulations from the tank before turning water therein, and failed to put the proper strainer into the tank, by reason of which the pipes became choked, and the hydrants stopped, so that water would not flow therein as it should; that one of the hydrants was not provided with a check and waste so as to empty the pipes when the supply pipe was closed, and that by reason thereof, and of the choking of the pipes, the hydrants froze, requiring time and labor to thaw them out. He also charges that the regulator furnished was worthless, wherefore defendant was required to expend time and labor in going to and from the mill to stop and start the same, to his damage. He also asked to recover for time and the use of a team in having the bands and hoops on the supply tank cut and replaced at the request of the plaintiff. The plaintiff, in reply, denies the counterclaim, and, on trial had, a verdict was returned in favor of the defendant for one hundred and

sixty-five dollars, together with certain special findings. Judgment was rendered on the verdict, and plaintiff appeals.—*Reversed*.

E. C. Herrick and *G. E. Jones* for appellant.

No appearance for appellee.

GIVEN, J.—I. It is obvious from the evidence that the defects alleged did not render the works valueless, and that they were such as might have been readily remedied at a moderate expense by ordinary efforts. In *Beymer v. McBride*, 37 Iowa, 118, it is said: "It is a general principle of law in cases of a breach of specific contract that, if the injured party can protect himself from damage, he is bound to do so, if practicable, at a moderate expense, or by ordinary efforts; and he can charge the delinquent party for such expenses and efforts, and have such damages only, as could not be prevented by the exercise of such diligence." In *Simpson v. City of Keokuk*, 34 Iowa, 568, it is said: "If the plaintiffs, by use of ordinary diligence and efforts, and at a moderate expense, might have prevented the damage, it seems necessarily to follow that their negligence contributed to the injury; and this, upon a well-settled rule, would defeat the plaintiffs' recovery." The evidence shows without conflict that the defendant continued to use these works as they were constructed from June, 1894, until the trial of this case, in June, 1896, without making any effort to remedy the defects complained of, or to prevent damage to his barn or grain, or loss of time, for which he seeks to recover. Under the rule announced in the cases quoted, the defendant would be required to protect himself from damages within a reasonable time. The court instructed in harmony with the cases cited, but did not define to the jury what is meant by reasonable time. Under the instructions the jury was at

liberty to allow the defendant damages for the entire two years, when it is beyond dispute that he could have, at moderate expense, and by ordinary effort, remedied the defects and stopped the damage in a much less time. While it was for the jury to determine what would be a reasonable time in which to have remedied the alleged defects, the court should have instructed as to what is meant by reasonable time, and that under the undisputed evidence two years was more than a reasonable time. While the instruction given correctly stated the law so far as it went, and nothing further was asked by the appellant, still we think the instruction was misleading to the prejudice of the appellant in that it permitted the jury to consider as a reasonable time that which, as a matter of law, was not reasonable.

II. As to the third count, the defendant admits the delivery to him of the corn harvester at the agreed price of one hundred and thirty dollars, but claims that he took it on trial, that it did not work satisfactorily, and that he returned it. The evidence shows without dispute that while he had it he loaned it to one Barber to cut his corn with, and that Barber cut six acres with it. The defendant testifies that he loaned it with the knowledge of the plaintiff, and this the plaintiff denies. Plaintiff asked an instruction as follows, which was refused: "You are
2 instructed that if you find from the evidence that the defendant loaned the corn harvester in question to the witness Barber for use, and that said Barber did use the same, and that such loaning to and use by the said Barber was without the knowledge or consent of the plaintiff, then such loaning to said Barber would constitute an acceptance of said machine by the defendant, and in that case plaintiff would be entitled to recover for said machine." In *Frey-Scheckler Co. v. Iowa Brick Co.*, 104 Iowa, 498, we said: "The general rule is that one who seeks to reject an article as not in accordance with the contract must do nothing after he discovers the true condition inconsistent

with the vendor's ownership of the property. * * * If is liable in this case because it did something, and something that is entirely at war with its claim now made that the title of the property never passed to it under the contract." The receipt of the goods may become an acceptance if the right of rejection is not exercised within a reasonable time, or if any act is done by the buyer which he would have no right to do unless as owner of the goods. 21 Am. & Eng. Enc. Law, 557, and cases cited. See, also, *Palmer v. Banfield*, 86 Wis. 441 (56 N. W. Rep. 1090); *Brown v. Foster*, 108 N. Y. 387 (15 N. E. Rep. 608). Surely, the defendant had no right to loan the harvester without the consent of the plaintiff, unless as owner thereof. We think it was error to refuse this instruction.

Other errors assigned and discussed by the appellant are not likely to arise on a retrial, and therefore are not further noticed. For the errors pointed out, the judgment is REVERSED.

WM. G. WATTERS, Appellant, v. JAMES W. MCGREAVY.

Evidence: TRANSACTIONS WITH ONE INSANE. Where recovery was sought against an insane person on notes payable to plaintiff's order, and the cashier of a bank at which some of the notes had been executed testified that plaintiff and defendant were always together when the money was loaned by or paid to the bank, and that on one occasion he did not know who received the benefit of money he had handed to them, it
3 was not error to exclude plaintiff's testimony as to such transactions and his partnership relations with defendant at the time, nor his evidence as to what notes referred to in books represented, since its admission would, by indirection, have enabled plaintiff to give testimony incompetent under Code, section 4604, declaring that no party shall be examined as a witness in regard to a personal transaction or communication with a person insane when the action is tried.

SAME. Where recovery was sought against an insane person on
1 notes payable to plaintiff's order, plaintiff's testimony that he

saw defendant sign the notes was properly excluded, under
2 Code, section 4604, declaring that no party to any action
shall be examined as a witness in regard to a personal trans-
action or communication with a person insane when the action
is tried.

INCOMPETENCY: *Ex parte statements.* Where plaintiff sought to
recover against an insane person on notes, *ex parte* statements
4 of plaintiff's agent in a written report of moneys collected and
paid out by him as defendant's guardian, were properly ex-
cluded as incompetent.

Directing Verdict: EVIDENCE: *Presumption of continuity.* Where
plaintiff sought to recover against an insane person on notes
payable to his order, and a partnership was shown to have
existed between the parties for some years prior to the execu-
tion of the notes, and there was no direct testimony that the
partnership had ceased to exist, and some of the notes grew
5 out of the extension of other notes, all being signed by defendant,
and indorsed by plaintiff at a bank to secure loans, and plain-
tiff and defendant were always together when loans were
made and paid, it was not error to refuse to direct a verdict
for plaintiff, since the presumption raised by giving a note,
that all prior matters were settled, does not arise in all cases,
and was negatived by such evidence, a partnership shown to
exist being presumed to continue till dissolution is shown.

Appeal from Dubuque District Court.—HON. J. L. HUSTED,
Judge.

MONDAY, MAY 21, 1900.

ACTION at law upon promissory notes. Trial to a jury,
and verdict and judgment for defendant. Plaintiff appeals.
—*Affirmed.*

Lyon & Lyon for appellant.

Hubert O'Donnell and *Henderson, Hurd, Lenehan & Kiesel* for appellee.

SHERWIN, J.—The plaintiff sues upon five promissory
notes drawn payable to his order and signed by the defendant.
They all purport to have been given in 1886, except the last,

which is dated February 25, 1887. The defendant has been insane for a number of years, and was so at the time of the trial below. His guardian defended, and pleaded, in substance, a co-partnership between plaintiff and his ward at the time the notes were executed, and that they were drawn payable to plaintiff, and signed by the defendant, for the convenience and use of the firm in borrowing money at the banks for firm purposes; that the plaintiff was the business and financial manager of the firm, and received all the money on the notes in question, and that none of it was ever received by the defendant for his sole use and benefit. The answer further alleges that at the time the notes sued upon were made the defendant was, and for a long time prior thereto had been, insane, incapable of understanding an obligation or a contract and his rights thereunder, and was induced to sign the notes in question without having received any compensation therefor; all of which was known to plaintiff. The answer further alleges payment.

2 Upon the issues thus joined the case was tried. Under the statute the plaintiff was not a competent witness "in regard to any personal transaction or communication" between himself and defendant. Numerous errors are assigned on the exclusion of plaintiff's testimony as to personal transactions and communications with the defendant. The plaintiff was permitted to testify that he knew the handwriting of the defendant, and that the signatures to the notes were in his handwriting; but the court would not permit him to testify that he saw the defendant sign them. The notes were made payable to the order of the plaintiff, clearly indicating in themselves a personal transaction, and the testimony was properly excluded. *Cole v. Marsh*, 92 Iowa, 379; *Martin v. Shannon*, 92 Iowa, 375; *Van Vechten v. Van Vechten* (Sup.), 20 N. Y. Supp. 140; *Holcomb v. Holcomb*, 95 N. Y. 316; *Kroh v. Heins*, 48 Neb. 691 (67 N. W. Rep. 771). Some of the notes in suit had been executed at a bank

in Dubuque, drawn to the order of Watters, and by him indorsed, and the money paid thereon by the bank through Mr. Harrigan the cashier, who testified, as to the various transactions, that the plaintiff and the defendant were always there together when the money was loaned by or paid to the bank. As to one transaction, Harrigan testified that he "handed the money to them," and did not know who received and got the benefit of it. The plaintiff attempted to testify as to these various transactions, and as to whether he had received any of the money gotten from the bank on these notes, and in the same connection he was asked if he was then in partnership with the defendant. A careful examination of the record convinces us that this testimony was properly excluded, as was also his evidence as to what the notes referred to in the books represented. If admitted, it would have allowed the plaintiff to do by indirection that which the law says may not be done. See cases *supra*.

There was no error in rejecting the *ex parte* statement of Blenkison. He was the agent of Watters, and his written report to him was not competent. But we cannot notice in detail more of the exceptions to evidence.

It is enough to say that we find no error in the admission or rejection thereof.

Plaintiff's motion to direct a verdict for him was rightly overruled. It is undoubtedly a correct rule of law that the giving of a note under certain circumstances raises a legal presumption that all matters between parties were settled up to that time. But this presumption does not arise in all cases. In this case it was admitted that the plaintiff and defendant had been in partnership for some years prior to December 31, 1884. There was no direct testimony that this partnership had been dissolved, or that business thereunder had ceased. When a partnership is once shown to exist, the law also presumes that it continues

until a dissolution is shown. The transactions of plaintiff and defendant at the banks were evidence tending to show that the notes there signed by the defendant and there indorsed by the plaintiff were for the use of the partnership, if one existed at the time; and this evidence might be considered by the jury sufficient to overcome any presumption of the law as to a complete prior settlement. Furthermore, these transactions themselves negative the claim made for them by the plaintiff.

We find no prejudicial error in the instructions given to the jury. They fairly and clearly stated the issues and the law which should govern the jury in its determination of the case from the evidence before it. The rule governing executed contracts with an insane person contended for by the plaintiff is the correct rule of law, and was given substantially as asked. *Behrens v. McKenzie*, 23 Iowa, 333; *Warfield v. Warfield*, 76 Iowa, 635. We think the case was tried and submitted without prejudicial error, and that the verdict finds sufficient support in the evidence. It is therefore AFFIRMED.

JAMES W. BROWN v. H. G. CURTIS AND BEN U. WOOD
Administrator of Estate of JOHN H. WOOD, Deceased,
Appellants.

Merger of Contracts: COMPENSATION OF ATTORNEY. An attorney made an agreement with his client, whose property was covered by mortgages and in litigation, to represent him, and obtain a loan to pay off the incumbrance, for which services he was to receive one-third of the property saved to the client. Afterwards, the litigation having ended adversely, the attorney, having failed to obtain the loan, purchased the client's equity in the property, giving notes for the same, and agreeing to pay the incumbrances, and that the notes should be the client's absolutely. *Held*, that the first contract was superseded by the second, and hence, in an action on the notes, no credit could be allowed the attorney for services rendered during the litigation.

111	542
1125	80
111	542
133	79
111	542
138	149

Appeal from Cass District Court.—HON. W. R. GREEN,
Judge.

MONDAY, MAY 21, 1900.

ACTION at law on two promissory notes. Defendants pleaded payment and certain other defenses and counter-claims that will be referred to in the body of the opinion. The case was tried to the court, resulting in a judgment for plaintiff. Defendants appeal.—*Affirmed.*

Curtis, Follette & Curtis and *Willard & Willard* for appellants.

De Lano & Meredith for appellee.

DEEMER, J.—In the year 1890 plaintiff was having litigation over some mortgages on his land and personal property, and in September of that year he entered into a written contract with defendant Curtis, by the terms of which Curtis was to receive in full for his legal services as counsel for plaintiff one-third of all the property, real and personal, that might be saved to plaintiff, and one-third of the rentals of the land while the litigation was pending. It was further agreed that Curtis should procure a loan on the land to pay the existing incumbrances, and redeem it from execution sales. The litigation ended in the early part of the year 1893, but Curtis failed to procure the loan as agreed. In consequence plaintiff was about to lose his property, and Curtis compensation for his services. Thereupon Curtis and one John H. Wood (now deceased) commenced negotiations with plaintiff looking to the purchase of his equity or redemption in the lands for the sum of twenty-six thousand five hundred dollars. Twenty-four thousand dollars of this sum was to be applied in liquidation of the judgments and incumbrances against the land, and plaintiff was to be re-

leased from liability to that extent. The contract then provides as follows: "And the balance, \$2,500, is to be paid over to the said Brown in two promissory notes, one for \$1,250, due in twelve months, one for \$1,250, due in two years, each to bear 7 per cent. interest from date, and payable annually. The \$2,500 is to be the said Brown's absolutely; and notes to be signed by the said Wood and Curtis." So far, the contract related simply to the real estate, but, in order to cover the personal property, the following stipulations were entered into: "All moneys and demands in the hands of N. N. Jones, either as agent, sheriff, or receiver, or in the hands of the Cass Co. Bank, or Dickerson & Wood, or I. Dickerson, or the clerk of the district court, not applied on or credited on the judgments against the said Brown, are to be held for the use of the said Brown and the said Curtis, except so far as said money may be needed to apply on claims above \$24,000; and Brown is to have two-thirds of same, and Curtis is to have one-third of same, as per their original written agreement. The amount is supposed to be over 1,500." It turned out, however, that there was nothing in the hands of any of these parties to be divided between Brown and Curtis. and that it required four hundred and forty-two dollars in addition to the twenty-four thousand dollars to pay off the judgments and incumbrances against the land. At the time this last contract was entered into, Curtis made no claim whatever that he was entitled to any part of the two thousand five hundred dollars that was to go to Brown, but there was an attempt to give Curtis a part of the personal property. That failed simply because there was no personal property saved. The notes in suit represent a part of the two thousand five hundred dollars agreed to be paid plaintiff by the contract last above mentioned. In answer, defendants say that the additional four hundred and forty-two dollars they were compelled to pay in satisfaction of incumbrances should be allowed as an offset against the note. This claim seems to

have been allowed by the district court, and, as the plaintiff has not appealed, no further attention need be given it.

Defendant Curtis also pleaded that he was entitled to a credit of six hundred and eighty-five dollars and thirty-three cents in virtue of his original contract for one-third of what was saved, as compensation for his services. To this plaintiff replies that Curtis had only partially performed his contract, and that, being unable or unwilling to comply therewith, the new contract was entered into with the defendant, whereby the former contract between plaintiff and Curtis was entirely superseded. In another division of his answer Curtis pleaded a counterclaim based on a note executed by plaintiff, April 28, 1882, to one Samuel Harlan, due eight months after date. Plaintiff in reply denied liability thereon, denied that defendant was the owner thereof, and also pleaded the statute of limitations. The issues between plaintiff and Wood, administrator of the estate of John H. Wood, deceased, need not be stated, as no complaint is made of the judgment of the trial court thereon.

Defendant Curtis makes no complaint of the finding of the court disallowing his counterclaim on the Harlan note, and the sole question for determination is, was the original contract, by which Curtis was to receive one-third of what he saved for Brown, superseded by the subsequent contract entered into between plaintiff and Curtis and Wood? That is a mixed question of law and fact and as the case is at law, and was tried to the court without a jury, its finding has the effect and force of a verdict, and should not be disturbed in so far as it relates to an issue of fact, unless so clearly against the evidence as to justify the conclusion that it was based on passion or prejudice. *Saar v. Finklin*, 79 Iowa, 61. Had we nothing but the two contracts, unaided by extrinsic evidence, we could not say that the court's finding, that the first contract was superseded by the second, is not sustained. It will be noticed that the second contract pro-

vides that the two thousand five hundred dollars to be paid Brown was to be his absolutely. This contract was signed by Curtis, and he also signed notes representing the whole of the two thousand five hundred dollars, and made no claim whatever that any part of this two thousand five hundred dollars belonged to him.

To a certain extent the former contract was recognized, for a division of the personal property was provided for "as per their original written agreement." This does not mean that the original agreement was to continue in force, for the whole of the subject-matter thereof was disposed of by the second instrument. While a new party was introduced, plaintiff and defendant were both parties to the new agreement, and it is evident from the fact that it covered the whole subject-matter, that it was intended as a substitute for the original. As everything save the land was divided by the second contract in accordance with the original agreement, the presumption is, that was the only division intended. Had a division of the two thousand five hundred dollars agreed to be paid plaintiff been intended, the contract would not have provided that this amount should go to Brown absolutely, but that the other property should be divided between Brown and Curtis. When a subsequent contract embraces the entire subject-matter of a prior one, the former being the last act of the parties, will be presumed to contain and express the true meaning, even though it be of no higher nature than the original contract. *Baxter v. Downer*, 29 Vt. 412. Aside from this, however, the trial court was justified in finding from extrinsic evidence that the parties intended the second contract to be a substitute for the first, or, at least, that plaintiff so understood it to be, and that defendant Curtis knew, when he entered into the second, that plaintiff so understood it. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to

suppose the others understood it. Code, section 4617; *Chicago Lumber Co. v. Tibble's Mfg. Co.*, 80 Iowa, 369; *Evans v. McConnell*, 99 Iowa, 326. The finding of the trial court should not be disturbed.—AFFIRMED.

JOHN MACKERALL v. THE OMAHA & ST. LOUIS RAILROAD
COMPANY, Appellant.

Contributory Negligence: JURY QUESTION: *Railroads.* Plaintiff, in approaching a railroad crossing, stopped his team, and looked and listened, when one hundred feet from the track. He then sat down with his back to the north, and drove slowly down a descent to the track. There was an embankment which obstructed his view of the track till within twenty feet of it. His attention was largely taken up with the bad
1 condition of the road, and he did not notice a train coming from the north, till the team was going on the rails, and he was struck and injured. *Held*, not sufficient to show contributory negligence as a matter of law.

EVIDENCE: *Negative statements.* Evidence of witnesses who were near a train at the time of an accident at a crossing, that
2 they heard neither the whistle or bell till the train passed the crossing, is not merely negative.

MISCONDUCT IN ARGUMENT. Where plaintiff's attorney in an action against a railroad, in which its employes were witnesses, stated
3 in argument that if the employes of a railroad company did not testify as the company desired they would be discharged, but such language was held improper, and was withdrawn, the argument did not constitute prejudicial error.

Appeal from Fremont District Court.—HON. WALTER I. SMITH, Judge.

TUESDAY, MAY 22, 1900.

ACTION for damages caused by a crossing collision. The defendant appeals from judgment on a verdict against it.—*Affirmed.*

J. G. Trimble and G. B. Jennings for appellant.

W. P. Ferguson for appellee.

111	547
114	94
829	611
279	111
111	547
120	653
111	547
126	237
111	547
131	48
111	547
132	595
111	547
134	725
111	547
135	37
111	547
138	550

LADD, J.—The plaintiff, in approaching a crossing from the west, stopped his team, looked, and listened, when one hundred feet from the railway, without observing or hearing the train. He then sat down on the north side of the hayrack with his feet in the box below, his back to the north, and his face towards the team, and slowly drove down a descent to the track. From there to within fourteen feet from the center of the track was an embankment, which obstructed his view up to at least twenty feet from such center. His attention was drawn to the gullies recently washed in the road, though given somewhat to the railroad. Just as the team was going on the rails, he noticed the train coming from the north, only a few feet distant, and he was thrown in the air to the embankment. As the engine was moving at the rate of thirty-five miles an hour, there was no possibility of escape after its discovery, and the evidence tended to show that he saw it at the first opportunity. The appellant contends that this record conclusively establishes contributory negligence. Not so because of sitting down, as possibly this may have been a matter of precaution for the management of his team in going down grade, and to avoid the ruts and side ditches. Nor can it be stated as a matter of law that he should have stopped again to look and listen. In *Winey v. Railway Co.*, 92 Iowa, 622, it was said: "The rule, no doubt, is that if the traveler, having looked and listened without seeing or hearing an approaching train within a reasonable distance of the crossing, is, by reason of a neglect of the railroad company to blow the statutory whistle, run upon, and injured, liability attaches." See, also, *Harper v. Barnard*, 99 Iowa, 159; *Moore v. Railroad Co.*, 102 Iowa, 600. The authorities cited by appellant are not in point. In some of them, as in *Schneider v. Railway Co.*, 99 Wis. 378 (75 N. W. Rep. 169), the injured party stopped where his vision was obstructed, and failed to look at a point where he could see. In others, if he had looked, the situation was such as that he must have seen, as in *Bloomfield v. Railway Co.*

74 Iowa, 608. Under the circumstances disclosed, it was for the jury to say whether the plaintiff stopped within a reasonable distance from the track, or was bound, in the exercise of ordinary care, to do so again within the one hundred feet.

II. The engineer and fireman declared there were two long and two short blasts of the whistle at the whistling post, and from there to the crossing the bell was rung. The conductor and two passengers claim to have heard the whistle and also three section men, who were working forty rods
2 below the crossing. On the other hand, the plaintiff testified that he heard no signals, and three others in a situation to hear, without their attention being diverted, say they heard neither the bell nor whistle until after the train had passed the crossing, when two blasts were sounded. Such evidence is not negative merely, as where a person, at a considerable distance, and giving attention to something else, declares he did not hear signals. See *Wickham v. Railway Co.*, 95 Wis. 23 (69 N. W. Rep. 982). The issue was for the jury to determine.

III. There was no abuse of discretion in permitting leading questions, nor in allowing the recollection of the engineer to be tested by inquiring whether he uniformly gave signals at crossings. The exceptions to the instructions are hypercritical, and demand no attention.

IV. It appears that defendant's counsel in his argument, urged that its employes, because of the confidence reposed in them, and responsibility of their positions, were entitled to superior credit as witnesses. To meet
3 this, plaintiff's attorney argued that, as omission to give signals was contrary to the company's rules, and might subject the employes to criminal prosecution, they would undoubtedly lose their places if they refused to testify as the company desired. The court, on objection, held this to be improper, and it was withdrawn. Again, the attorney asserted, in substance, that loyalty and subserviency, rather

than truthfulness, was demanded by railroads, and that employes were discharged when they did not testify as was desired. The court promptly held this improper, an assertion unsupported by the evidence, and it was withdrawn. Undoubtedly, the supposed bias of an employe for his employer is not an objectionable inference to be drawn in argument. Here the attorney went further, and asserted the existence of a reprehensible practice not shown to exist. As the court promptly reproved the conduct, and the remarks were withdrawn, the ruling that no prejudice resulted ought not to be disturbed. *Erb v. Insurance Co.*, 98 Iowa, 606; *Lindsay v. City of Des Moines*, 74 Iowa, 112; *Nicks v. Railway Co.*, 84 Iowa, 32.

Three pages of the appellee's amended abstract, on appellant's motion, will be taxed to appellee.—AFFIRMED.

ROBINSON & Co., Appellants, v. BERKEY & MARTIN.

111 550
123 557

111 550
d133 666

Warranty: TIME TO REPLACE: *Jury question.* A warranty given on
 1 the sale of certain machinery provided that if the machinery
 could not be made to fill the warranty, plaintiffs should
 2 either furnish another machine, or return the purchase price.
 6 Plaintiff's expert, on September 21st, left the machine as a
 failure and on the next day plaintiff's agent was notified of
 7 the fact. Nothing further was done or offered by plaintiffs,
 and on September 26th, defendants rescinded the contract.
Held, that the question whether plaintiffs were given a reason-
 able time in which to replace the machine was properly left
 to the jury. *Manuf. Co. v. Spitznogle*, 54 Iowa, 36, distin-
 guished.

PRACTICE: *Instructions.* The question being whether a warrantor
 had reasonable time in which to give notice that he would do
 nothing further with the article warranted, it was, perhaps,
 7 erroneous to submit what was a reasonable time, as a pure
 question of fact. It is ordinarily a mixed one of law and fact.
 It should have gone to the jury with certain limitations, but
 the failure to do this, is waived by failure to request such
 action.

CONSTRUCTION: *Breach as to parts of machine.* A provision in an order for a machine that the failure of the warranty as to any separate part or attachment of the machine shall not
8 affect the liability of the purchaser, except as to such part or attachment, does not apply to a part or attachment furnished with the machine at a gross price.

BREACH OF WARRANTY: *Construction of contract.* Where a separator and stacker are sold under a contract providing that,
9 "if the stacker cannot be made to fill the warranty, it shall be removed from the separator," a failure to remove the stacker is not a breach of the contract; both stacker and separator having failed to work.

Constructive Delivery of Machine: **PASSING OF TITLE.** Plaintiffs sold defendants certain machinery, and defendants gave old machinery and their notes in payment. The notes were de-
4 livered to plaintiff's agent, who told defendants to leave the
5 old machinery on his farm till further order, which was done. *Held*, that the title of the old machinery passed to plaintiffs, though they did not have actual custody of it, neither the statute of frauds or the rights of third persons being involved.

Pleadings as Evidence: **JURY QUESTION:** *Delivery of notes.* Plaintiffs sold defendants certain machinery and gave a written warranty, which provided that failure to settle at the time and place of delivery should be a waiver of the warranty, without affecting the liability of defendants for the price. Defendants gave notes in part payment. In a suit to recover the price of the machinery, a petition for an injunction, under
3 which a writ had issued, restraining plaintiff's agent from turning the note over to plaintiff, was introduced to show that the terms of settlement had not been complied with by defendants, in that they had not delivered the notes to plaintiffs absolutely, but only to their agent in *escrow*. Defendant's amended answer alleged that the notes were given according to contract, though the original answer alleged that they were given in *escrow*. *Held*, that whether an absolute or conditional delivery of the notes, was made, was for the jury.

Appeal from Johnson District Court.—HON. M. J. WADE,
Judge.

TUESDAY, MAY 22, 1900.

ACTION upon written orders for the price of certain farm machinery sold by plaintiffs to defendants. The de-

fense was a breach of warranty, together with rescission of the contract. Trial to jury. Verdict and judgment for defendants. Plaintiffs appeal.—*Affirmed*.

Remley, Ney & Remely for appellants.

Baker & Ball for appellees.

WATERMAN, J.—This case was here on a former appeal. 100 Iowa, 136. The statement of the issues there made will suffice, with the exception of a change in the defense presented by way of amendment to the answer after
1 the case was remanded. Defendants withdrew the following clause of the original answer: "Further answering the said first count, they admit that they refused to deliver to plaintiff the said 33-inch cylinder Roberts, Thorp & Co., thrasher, the Reeves stacker, the Perfection weigher, the oats and timothy sieves; but they deny that they have continued to use the same, and aver that they only refused to deliver as they refused to deliver said notes,—that is until the said new outfit by them purchased should be made to comply with the warranties given by the plaintiff in making the sale thereof, and they say plaintiff agreed thereto." They also allege a modification of the contract of purchase, and waiver of some of its terms, by one Dunlap, an agent of plaintiffs, whose authority therefor they assert to be in writing. We shall make no further statement of the facts here than is necessary to an understanding of the points ruled. Defendants, in writing, ordered of plaintiffs a thrasher, feeder, band cutter, and weigher, for which they agreed to give in exchange a Roberts & Thorp thrasher, etc., and to execute their two notes, for two hundred and twenty-five dollars each. The order also contained this clause: "Said notes to be made payable to the order of Robinson & Co., payable in bank, and without relief from valuation or appraisement laws. The undersigned agrees to give chattel mortgage on

machinery above ordered, and other security thereon, subject to the approval of Robinson & Co.” The machinery so ordered was warranted by plaintiffs on these conditions:

- 2 “Conditioned, that if, inside of ten days from the day of the first use of the said machinery, it shall fail to fill the warranty, written notice shall be given immediately by the purchaser to Robinson & Co., at Richmond, Indiana, by registered letter, and written notice, also, to the local agent through whom the same was received, stating particularly what parts and in what way it fails to fill the warranty, and a reasonable time allowed the company to get a man or men to the machine and remedy defects, if there be any (if it be of such nature that a remedy cannot be suggested by letter). The purchaser also to render all necessary and friendly assistance and co-operation in making the machinery a practical success. If any part of the machinery cannot thus be made to fill the warranty, that part shall be returned by the purchaser to the place where it was received; and the company shall either furnish another machine, part, or attachment, which shall perform the work, or return the money and notes which it received for the machine, or give credit for the amount received for the part or attachment which may have failed to fill the warranty, and thereby be released from any further liability herein. The failure of any separate machine, part, or attachment shall not affect the contract or liability of the purchaser for any other separate machine, part, or attachment which is not defective. Failure to settle for the machinery at the time and place of delivery, or failure to give written notice as provided, or failure to render friendly assistance as herein also provided for, or any abuse, misuse, or unnecessary exposure or waste committed or suffered by the purchaser, shall be a waiver of the warranty and release of the warrantor, without in any way affecting the liability of the purchaser for the price of the machinery, or the notes given therefor. Notice: The machinery above described is ordered, pur-

chased, and sold subject to this warranty, and no other, either expressed or implied. No agent or salesman has general agency powers, and is authorized only to make sales according to special instructions, and subject to approval at the home office. All agreements must be in writing, and contained in this order. No agent or salesman has power to bind the company by either verbal or written contracts or promises outside of this contract. This contract not to be binding on the company until accepted by Robinson & Co. at its home office, at Richmond, Indiana." At the time of giving the above order, defendants also gave plaintiffs a written order for a straw stacker to go with the thresher. This also contained a warranty, the conditions of which were substantially those above set out, so far as the issues here are concerned, save that in case of a breach the stacker was "to be removed from the separator."

II. It is not seriously disputed that the machinery sold (both thresher and stacker) failed to fulfill the terms of the warranty. But it is claimed that the warranty was waived by defendants failing to settle therefor as agreed. While it is true that the original answer alleged that the notes for the machinery were given Dunlap (plaintiffs' agent in Iowa City) in escrow, by agreement with plaintiffs, and substantially the same averment is made in a petition for an injunction filed by defendants, under which a writ issued, restraining Dunlap from turning the notes over to plaintiffs, yet, in the answer as we now have it, defendants allege that the notes were given according to contract. The petition for an injunction was introduced in evidence, to show by its allegations that the terms of settlement had not been complied with by defendants, for that they had not delivered said notes to plaintiffs absolutely. The answer as it stands, and the petition for injunction, were duly verified. It is undisputed that the notes were signed and delivered to Dunlap, who was authorized to receive them for plaintiffs. We think it was for the jury to say, under these

circumstances, whether an absolute delivery of the notes was made. No other evidence on this point is in the record. But it is charged that in another respect there was a failure
4 to make the settlement as agreed, by reason of which plaintiffs were relieved of their warranty. The Roberts & Thorp thrasher which defendants were to give in part payment for the outfit purchased was not brought at the time, and left by defendants at the place where the notes were given, and it is said that in this respect they failed to keep their contract obligation. The only provision in the agreement on this subject is as follows: "Failure to settle for the machinery at the time and place of agreement * * * shall be a waiver of the warranty, and release of warrantor, without in any way affecting the liability of the purchasers," etc. Defendant Berkey testified that Dunlap, who was admittedly plaintiffs' agent to make settlement, told him to leave the Roberts & Thorp machine on the farm of said defendant, where it then was, until further orders; and this was done. The claim of appellants is that Dunlap's authority did not extend so far as to authorize him to waive any part of the written order. On the other hand, it is asserted on behalf of defendants that his act in relation to this matter was authorized by a letter from plaintiffs to them. We need not, in the view we take, give attention to this matter of the letter; for, although it was submitted to the jury to find whether the letter mentioned conferred this authority on Dunlap, or may have been reasonably understood to do so, yet this, as we shall attempt to show, was without prejudice. When defendants executed and delivered the notes, and placed the old machinery at the disposal of plaintiffs' agent, were they required to do more, if no more was desired? It may be that Dunlap could have insisted that actual possession of the machine be given him at the time and place of settlement, but it does follow that he was obliged so to do. Suppose he had delivered the bill of lading and received the notes at his resi-

dence, but desired the machine taken to his warehouse, or suppose, as quite likely was the case, that he was not ready to care for the machine he was to receive, and, after its offer and acceptance, had desired defendants to hold it for him for a time; would it not be going too far to say that no settlement was had? The thought of appellants seems to be that the giving of actual custody of the machine was necessary to constitute delivery. We must bear in mind that neither the statute of frauds nor the rights of third persons is in question. The word "deliver" is used in the law sometimes with reference to the passing of the property or title, and sometimes to the change of possession. Here it should be understood in the first of these senses. When title to the old machine passed, settlement was made. In Benjamin Sales, section 675, it is said: "In general, it would be perfectly proper, and even technical, to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the vendor. The buyer owns the goods, has the right of possession, may take them away, sell or dispose of them at his pleasure, and maintain trover for them." See, also, Parsons Contracts, 442. There can be no question but, as between the parties, the title to the old
5 machine passed to plaintiffs on the completion of the transaction with Dunlap. If, then, the jury found in this case, as they must have done, an offer and acceptance of the old machine, there was, in law, a settlement with Dunlap, and the plaintiffs were not prejudiced by the fact that the court left to the jury to find the extent of the agent's authority; for it is conceded that he had authority to make the settlement according to the terms of the contract. The case of *Davis v. Robinson*, 67 Iowa, 355, differs materially in its facts from the one at bar; for there defendant was not told to leave the machine at a place different from that of settlement, and he admits he did not deliver according to contract.

III. The next claim made is that plaintiffs, under the contract, had a right to exercise an option, which was denied them. The facts are that plaintiffs were notified as soon as it was discovered that the machine would not work properly, and they sent an expert (one Thomas) to put it in repair. Thomas failed in his efforts, and so notified plaintiffs. The contention of plaintiffs is that they should have been allowed a reasonable time in which to make further efforts, or to replace the machine with a new one, and that this was not done. Thomas was at defendants' place, working on the machine, on September 20th or 21st. On that day he announced his inability to make it operate as agreed. While defendants said to Thomas, on the day he announced the fact that he was unable to put the machine in order, that the contract was rescinded, yet he was but a special agent, and what was so said may be disregarded. On this same day defendants notified Dunlap that the machine could not be put in order, and expressed the wish to return it and rescind the contract. Dunlap refused. As a matter of fact, defendants did no positive or binding act in the nature of rescinding until they procured the writ restraining Dunlap from turning over to plaintiffs the notes which he still held, which was on September 26th. Plaintiffs' agent had notice on the 20th or 21st that the machine was a failure. Nothing further was done or offered by plaintiffs before the 26th, when the writ of injunction issued. In this respect the case differs from *Manufacturing Co. v. Spitznogle*, 54 Iowa, 36. In that case the attempt was made to rescind while plaintiffs were making every reasonable effort to put the machine in condition. Furthermore, that case was decided on the point that the machine was surrendered conditionally, and not absolutely. Were plaintiffs allowed a reasonable time in which to exercise their option? Their place of business was in Richmond, Indiana. Their agent in Iowa City had prompt notice of the facts. How quickly he or plaintiffs should have acted in notifying defendants that

plaintiffs intended doing something more was dependent, not on the latter's situation and circumstances only, but also on those of defendants. What is a reasonable time is ordinarily a mixed question of law and fact. *Derosia v. Railway Co.*, 18 Minn. 133. The court submitted the matter to the jury as a pure question of fact. This, perhaps, was erroneous. The legal rules governing should have been also stated, but this was not asked. On the contrary, plaintiffs requested an instruction in which the jury was informed, as matter of law, that plaintiffs were not given a reasonable time in which to exercise their option. What time was reasonable in which to get a new machine to defendants would differ materially from the time that would be reasonable in which to notify them that something further would be done. It is in this last respect that the failure seems to have been made here; for such a notice would seem a necessary element of plaintiffs' right to furnish a new machine, unless the machine could be delivered as soon as notice could be given. Thomas left the machine as a failure on the 21st, at the latest, and said nothing of anything more being done to it. On the next day Dunlap was notified of the situation, and he gave no assurance whatever as to what plaintiffs would do. On the 26th, defendants took the action of which we have spoken. The question of fact as to what was a reasonable time was proper to go to the jury. If, as we think, it should have been submitted under certain legal restrictions, plaintiffs cannot complain of the failure, for they did not ask that this be done. *Frohs v. City of Dubuque*, 109 Iowa, 219.

IV. Plaintiffs claim the price of the Perfection weigher, in any event, because they say there was no breach of warranty as to it. But it was included in the order for the thresher, at a gross price of four hundred and fifty dollars.

8 A rescission of the sale affected all the property covered by the order. There was a clause in the written order to this effect: "Clover-hulling attachments, baggers, weighers, wagon loaders, self-feeders, and other ex-

tra attachments are furnished at stipulated separate prices, and are subject to the above warranty." We think the provision in the order, to the effect that the failure of the warranty, as to any separate part or attachment of the machine should not affect the liability of the purchaser, except as to such part or attachment, must be limited to a part or attachment furnished at a separate, fixed price.

V. Defendants in their answer allege that the straw-stacker was fitted to the thresher, and, without alterations in the latter, no other stacker could be used with it. Plaintiffs sought to strike this, but their motion was overruled. We cannot see how they were prejudiced, if the ruling was incorrect. And we may say in this connection, in response to an argument made, that the answer set up a defect in the stacker.

VI. Another contention is that, on the claimed breach of warranty, the stacker was not removed from the thresher as provided in the contract. Plaintiffs argue this point as though this contract required that, in case the thresher failed to work as agreed, the stacker should be removed, and the thresher operated without it. This is not the contract provision. The agreement was that, if the "stacker
9 could not be made to fill the warranty, it is to be removed from the separator." Presumably, this was for the purpose of having it at plaintiffs' disposal on its return to them. But when, as here, both separator and stacker failed and were returned, there was no such reason for its removal, as if defendants had retained the former in their possession.

VII. What we have said covers the controlling questions in the case. A number of errors are assigned on the admission and rejection of testimony. We have examined each of the matters referred to, and find no prejudicial error in the court's rulings.—AFFIRMED.

111	560
117	57

111	560
128	440

111	560
129	730

111	560
139	632

SAMUEL ALLERTON, Appellant v. MONONA COUNTY.

Statutes Pertaining to Remedy: CHANGE IN: *Effect on suits pending.* McClain's Code, section 1852, provides that, in actions for taxes erroneously or wrongfully assessed for the construction of ditches or drains, it shall only be necessary to show that the lands so taxed were not benefited. Code, section 1947, provides that it shall not be competent in such actions to show that the lands assessed were not benefited by the improvements. *Held*, that, since these statutes pertain exclusively to the remedy, the second, being in force when a petition for the recovery of taxes wrongfully assessed was filed, applied thereto, and, where the sole ground of recovery alleged was that the lands were not benefited, a demurrer to the petition was properly sustained.

Appeal from Monona District Court.—HON. FRANK R. GAYNOR, Judge.

TUESDAY, MAY 22, 1900.

DEFENDANT's demurrer to the plaintiff's petition was sustained; and, plaintiff electing to stand on his petition, judgment was rendered against him, from which he appeals.—*Affirmed.*

S. H. Cochran for appellant.

E. H. Hubbard and *B. F. Ross* for appellee.

GIVEN, J.—On October 15, 1897, the plaintiff filed his petition in two counts, asking to recover one thousand four hundred and twenty-nine dollars and seventy-four cents, taxes levied upon lands owned by him to pay for constructing a ditch, which taxes he paid under protest, and which the defendant's board of supervisors refused to order refunded. The sole ground alleged for recovery is that the construction of the ditch is of no benefit whatever to plaintiff's land. No

allegations are made showing that the tax was for any other reason illegal. The defendant demurred to each count on the ground that they fail to set forth any matter on account of which the said tax is erroneous, illegal, or contrary to law. Plaintiff relies upon the provisions in section 1852, McClain's Code, that, in actions for recovery of taxes erroneously or wrongfully assessed, "it shall only be necessary to prove that such lands so assessed were not benefited by the location, construction or maintenance of such ditch, drain or water course." Section 1947 of the present Code, which took effect prior to the filing of this petition, and prior to the holding on the demurrer, provides that, on appeals from the assessment made in such cases as this, "it shall not be competent to show that the lands assessed were not benefited by the improvement." These statutes simply fix a rule of evidence. The rule pertains exclusively to the remedy, and it was within the power of the legislature to change it. See *Cooley*, Constitutional Limitations, section 450; *Southwick v. Southwick*, 49 N. Y. 510; *Parsons v. Carey*, 28 Iowa, 431; *Wormley v. Hamburg*, 40 Iowa, 22; *Wood v. Brolliar*, 40 Iowa, 591; *Land Co. v. Soper*, 39 Iowa, 112; *Tilton v. Swift*, 40 Iowa, 78; *Drake v. Jordan*, 73 Iowa, 707; *Kossuth County v. Wallace*, 60 Iowa, 508; *Richman v. Board*, 70 Iowa, 627; *Chambliss v. Johnson*, 77 Iowa, 611. This case having been tried under the present Code, the rule of evidence therein prescribed applies. *Wormley v. Hamburg* and *Wood v. Brolliar*, *supra*. It is certainly clear that the present Code controls, and that under it plaintiff cannot be permitted to prove that his land is not benefited by the ditch. It follows therefrom that in neither count has he shown that the tax is illegal, or that he is entitled to recover as demanded. This conclusion fully disposes of the case, and it is unnecessary that we consider the other questions raised by the demurrer to the second count of the petition. The demurrer was properly sustained.—AFFIRMED.

J. A. BRADLEY V. IOWA CENTRAL RAILWAY COMPANY.

Burning of Meadow: MEASURE OF DAMAGE. Where a meadow is destroyed by fire, the measure of damages is the cost of re-
2 storing it to its former condition, and its rental value as such until it is restored.

SAME: Hedges. Where a hedge is destroyed by fire, the measure
2 of damages is the difference between what the property is worth with the hedge and what it is worth without it.

SAME. Where a meadow is destroyed by fire, the plaintiff is en-
3 titled to recover the value of the growing grass destroyed, in addition to damages for injury to the meadow.

EVIDENCE. Where the cost of restoring a meadow destroyed by
4 fire was in issue, evidence that plaintiff had rented it for a certain sum per acre before he began to remake it was properly excluded as immaterial.

SAME. Where the damages resulting from the burning of an old meadow were in issue, it was proper to exclude evidence by
6 defendant to show that it was more profitable for plaintiff to have plowed it up and planted other crops.

Exclusion. Where a fire set by defendant's locomotive reached plaintiff's meadow after burning another meadow nearby, and
5 it was shown that the grass on the two meadows was of equal height, it was reversible error to exclude evidence offered by defendant to show that the roots of the grass in the meadow burned first were not injured.

Opinion evidence. Opinions of witnesses as to the effect of flames
7 on a meadow and hedge are admissible when they have shown themselves qualified to express an opinion.

Trial: INSTRUCTIONS: Waived issue. Case will not be reversed for
8 failure to charge the jury on an issue which was waived in the court below.

Appeal: DENIAL OF ABSTRACT. A general denial by the appellee that
1 appellant's abstract contains all the evidence does not conform to supreme court rule 22, and will be disregarded.

Appeal from Appanoose District Court.—HON. T. M. FEE,
Judge.

TUESDAY, MAY 22, 1900.

111	562
116	218
116	309
116	310
117	346
117	347

111	562
122	35

111	562
126	587

111	562
127	423

111	562
134	717

ACTION to recover damages for property destroyed by fire, which, it is claimed, was negligently set out by an engine on defendant's road. There was a jury trial, and verdict for plaintiff. From a judgment rendered thereon, defendant appeals.—*Reversed*.

George W. Seever and *Mabry & Payne* for appellant.

C. F. Howell for appellee.

WATERMAN, J.—Appellee denies generally that appellant's abstract contains all the evidence. This does
1 not conform to rule 22, governing the practice in this court. We shall disregard it. See *City of Fort Madison v. Moore*, 109 Iowa, 476.

I. No particular complaint is made of the finding that defendant was negligent, so that fact may be accepted as established. The questions presented here relate to rulings on evidence, and to instructions given and refused. The property destroyed consisted of a quantity of hay, growing grass, the roots of grass in a meadow, and a hedge fence.

The trial court adopted the theory that the measure
2 of plaintiff's damage for injury to the meadow was the value of the growing grass and the cost of restoring the meadow to its former condition. Plaintiff introduced evidence to show the amount of both items. Appellee insists that defendant's exception to the evidence showing the cost of restoring the meadow was not sufficient to enable it now to claim, as it attempts to do, that this was not the correct measure of damage; but we think this is not so. The point is properly made, and the rule of damages is the first question we have to consider. In *Vermilya v. Railway Co.*, 66 Iowa, 606-616, we held that the measure of damage for the destruction of a meadow was the cost of restoring it to its condition before the fire. In *Graessle v. Carpenter*, 70 Iowa, 166, and *Hamilton v. Railroad Co.*, 84 Iowa, 131, this rule was confirmed, and these cases have

never been questioned, though it is true we have adopted a different rule where trees are destroyed; but we think we shall be able to show that some reason exists for the distinction. The purpose of the law, where one has been injured by the tort of another, is to reimburse the sufferer for his loss. Where one's meadow has been destroyed he is entitled to recover its value, and how better can its value be ascertained than by finding what it would cost to reproduce or restore it? While there is a conflict in the cases as to the manner in which such damage should be estimated, the rule in this state is not without support in authority. In *Railway Co. v. Jones*, 59 Ark. 105 (26 S. W. Rep. 595), it is held that, where a meadow is destroyed by fire, the measure of damages is the cost of reseeding it, and its rental value until it is restored. This we regard as a more accurate statement of the rule than merely to say that the measure is the cost of restoration. While this might result in giving plaintiff a better meadow than he lost, defendant cannot complain. It must make good the loss it has occasioned. If it cannot do this without doing something more, the plaintiff should not suffer. Defendant insists the rule by which the damages should be measured is the difference between what the farm was worth with the meadow and what it was worth without it. This is the method, we have held, by which the value of an orchard destroyed should be measured. *Rowe v. Railway Co.*, 102 Iowa, 286, and cases cited. And it was this rule the trial court applied to the hedge in the case at bar. An objection to this rule with relation to a meadow is that it is always possible to find many witnesses who would value a farm just as high without a meadow as with it, and yet to a man who wants a meadow it certainly has some value. The reason for the distinction this court has made in the manner of estimating the damages for the destruction of a meadow and those for the destruction of trees—and a hedge is to be considered the same as trees—is this: The value of the use during the time lost is an important element. This can be

accurately ascertained in the case of a meadow, but cannot as to trees or hedge. How long it will take to get grass in a certain field can be foretold with substantial certainty; how long it will take trees or a hedge to attain a certain size is largely a subject of guess. In any case, it takes so long as to leave too much room for doubtful elements to enter into the calculation. We think the case was tried on the correct theory as to the measure of damage, both as to the meadow and the hedge.

II. Plaintiff was allowed to introduce evidence of the value of the growing grass upon this meadow, and this, with the cost of restoring the meadow, was given the jury as an element of damages. The complaint on this score
3 is that plaintiff was thus awarded double damages.

This, we think, is not so. Restoring the meadow meant, and could only have been understood to mean, putting the grass roots in the condition they were before the fire. Clearly, the plaintiff was entitled to recover for the value of the grass, if any, which was destroyed. In a case quite similar to this, where a meadow was destroyed by fire the supreme court of Texas held that plaintiff was entitled, in addition to the value of the grass destroyed, to damages for injury to the roots. *Railway Co. v. Ayers* (Tex.) 8 S. W. Rep. 538. See also, *Railroad Co. v. Harlin*, 50 Neb. 698 (70 N. W. Rep. 263-268, 36 L. R. A. 417).

III. Plaintiff was asked on cross-examination whether he had not in fact rented this meadow field for two dollars and fifty cents per acre the year following the fire. An objection to this was sustained, and the claim is, the ruling was erroneous. Plaintiff was entitled to recover the cost of restoring the meadow, which included its rental value
4 as such, even though he did not begin at once to remake it. What he did with the field in the interval was immaterial. If defendant had offered to show that, where newly seeded down to grass, the field had a rental

value for other purposes, that would not interfere with its restoration as a meadow, it would have been proper.

IV. Before the fire reached plaintiff's meadow, it passed over and burned the meadow of one Vinzant, near by, and defendant sought to show that the roots of the grass in Vinzant's meadow were not injured. This evidence was re-

5 fused. The fire occurred in October, and in the spring following plaintiff's meadow was plowed up.

It was shown that the grass on the two meadows was of equal height at the time of the fire. This was a sufficient showing of similar conditions to warrant the receipt of the testimony. It should have been admitted.

V. It was a part of the defendant's contention that this meadow was old and worthless, because it had grown up in bluegrass and redtop, and on cross-examination of a witness (Phillips) he was asked, in substance, whether it was not better to plow up a meadow that had bluegrass and red-

6 top in it, and plant some other crop, and also whether such land is not the best for corn. These questions were objected to, and the objections properly sustained.

Plaintiff was not obliged to plow up his meadow, and plant some other crop, though it might have been thought profitable to do so. He was entitled to keep his land in grass, and, if it had any value, to recover from one who destroyed the crop he saw fit to raise.

VI. Defendant offered two witnesses, who saw the meadow and hedge after the fire, and asked for their opinions as to the effect of the flames upon each. The testimony

7 was excluded. These witnesses showed themselves qualified to express an opinion. That such opinions are admissible, see Lawson, Expert Evidence 15-19.

VII. Next, the instructions are complained of in this, that in stating the issues to the jury the defense of want of

negligence is not referred to. As we have said, no such defense is presented in this court. So far as the argument here is concerned, that issue is waived, and we may well conceive from this fact that it was abandoned in the court below. We shall not reverse a case for failure to present a defense to the jury, when the appellant does not consider it substantial enough to discuss it on appeal.

VIII. Some other questions are discussed, but they are either disposed of by what has been said, or are not likely to arise on another trial. For the reasons given, the judgment will be REVERSED.

W. T. JOYCE, Appellee, v. E. C. PERRY, J. A. F. BRUNNIER, W. M. HARRISON, ISABELLA A. HARRISON, GEORGE W. BOWEN, KIRK L. WILLIAMS, Defendants. E. C. PERRY and J. A. F. BRUNNIER, Appellants.

111	567
117	502
111	567
141	248

Fraudulent Conveyance: GRANTEE AS BONA FIDE PURCHASER. A subsequent grantee of lands conveyed by husband and wife in fraud of creditors, who successfully prosecuted a suit to set aside a conveyance to a prior grantee on the ground of fraud, is not entitled to the defense of a *bona fide* purchaser, in an action against him to subject the land to a judgment subsequently recovered against the original grantors.

JUDGMENTS: *How made liens.* A judgment recovered subsequent to a conveyance of real estate in fraud of creditors is not a lien on the land, and can be made so only by suit in equity provided the land would have been subject thereto if the title had remained in the debtors.

LANDS INCLUDING UNSELECTED HOMESTEAD. While a conveyance of land used as a homestead will not be set aside as in fraud of creditors, yet, where the homestead might have been selected from a part only of the land conveyed, the balance being subject to the grantor's debts, no homestead having in fact been selected, a decree declaring a judgment against the grantors, a lien on the land superior to the rights of fraudulent grantees was proper.

Appeal: OBJECTION BELOW. Where, in a suit to set aside conveyances of land as in fraud of creditors, the grantee did, in the
4 district court, not plead liens alleged to be superior to plaintiff's rights, he cannot urge such question on appeal.

Appeal from Carroll District Court.—HON. S. M. ELWOOD,
Judge.

TUESDAY, MAY 22, 1900.

THE defendants W. M. Harrison and Isabella A. Harrison are husband and wife. The latter was the owner of eighty acres of land in Carroll county, Iowa, which for a number of years was occupied by herself and her husband. January 31, 1896, they conveyed this land by warranty deed to one Kirk L. Williams. On the first day of August 1896, Williams conveyed the same land by quitclaim deed to George W. Bowen. August 10 and 11, 1896, Isabella A. Harrison and her husband also executed a quitclaim deed of the same land to George W. Bowen. September 22, 1896, George W. Bowen conveyed by quitclaim deed to the defendant J. A. F. Brunnier, and on the twenty-eighth day of August, 1897, J. A. F. Brunnier conveyed the entire tract to the defendant E. C. Perry by warranty deed. April 15, 1896, the plaintiff herein obtained a judgment against the defendants W. M. and Isabella A. Harrison, in the district court of Carroll county, for the sum of eighty-one dollars and forty-six cents and costs, which judgment is still unpaid. This is an action to establish said judgment as a lien upon said land. The plaintiff alleged that the conveyance to Williams was made for the purpose of hindering and delaying the creditors of the Harrisons, and was fraudulent and void, and that the defendants Bowen, Brunnier, and Perry had knowledge of the fraudulent character of said conveyance when they took the title to said land. The defense is a general denial, and an allegation that the land was the homestead of the Harrisons when conveyed to Williams. The dis-

strict court granted the plaintiff the relief prayed, and the defendants E. C. Perry and J. A. F. Brunnier appeal.—*Affirmed.*

Douglas Rogers for appellants.

Lee & Robb for appellee.

SHERWIN, J.—That the conveyance of this land from Isabella A. and W. M. Harrison to Kirk L. Williams was fraudulent cannot be questioned. The defendant George W.

1 Bowen knew this fact when he took the title, and the defendant J. A. F. Brunnier successfully prosecuted an action to set aside the conveyance to Williams on the ground of fraud, so that he had full notice of the character of that transaction. No claim can therefore be made that any of Perry's grantors were without actual knowledge of the fraud in the conveyance to Williams. The judgment which the plaintiff held against W. M. and Isabella A. Harrison was obtained after the transfer of the title, and hence was not a lien upon the land. *Howland v. Knox*, 59 Iowa, 46. But it may be made a lien thereon by an action in equity, provided the land would have been subject thereto if the title had remained in the debtors.

One of the points made by the appellants is that this land was the homestead of the debtors, and consequently the conveyance cannot be set aside as fraudulent. It is true, this court has so held where the homestead alone was in-
2 volved, but it has never applied this rule to the conveyance of a body of land out of which the homestead might be selected. No homestead had been selected in this case, and but forty acres could in any event be reserved therefor, and the balance of the land was subject to the payment of debts; and all the decree granted was that the judgment be a lien upon the real estate superior to that of the defendants.

We are fully satisfied from the evidence that the defendant E. C. Perry had actual knowledge before his pur-

chase that the conveyance from the Harrisons to Williams was fraudulent. He was not, therefore, a *bona fide* purchaser, as claimed, and is not entitled to protection as such. *Jones v. Heatherington*, 45 Iowa, 681; *Williamson v. Wachenheim*, 58 Iowa, 277.

The defendant J. A. F. Brunnier contends that he has liens upon said land which are superior to plaintiff's, but he did not so plead in the district court, and we can grant him no relief here not asked there.

Walker v. Walker, 93 Iowa, 681; *Williamson v. Wachenheim*, 69 Iowa, 710. The judgment of the district court is AFFIRMED.

IN RE WILL OF PHILLIP BARRETT, Deceased.

Construction of Will: INTEREST DEVISED. Where testator gave all his property to his wife, to use, enjoy, and manage as she, in her judgment, saw fit, the wife took a fee, and not a simple life estate.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

TUESDAY, MAY 22, 1900.

PROCEEDINGS for the construction of the will of Phillip Barrett, deceased. The trial court held that Eleanor S. Barrett, widow, took but a life estate, and she appeals.—*Reversed*.

J. C. Davis and Smith & Smith for appellant.

Giffen & Voris for appellee.

DEEMER, J.—The provision of the will we are asked to construe reads as follows: "I give and bequeath to my beloved wife, Eleanor S. Barrett, all of my property, real

111	570
118	272

111	570
121	55
121	299

111	570
132	577

111	570
139	662

and personal, of every description, to use, enjoy, and manage as she, in her judgment, sees fit." Does this devise a fee or life estate? The trial court held that it created but a life estate. If that which follows the word "description," in the will, were eliminated, there would be no doubt that an absolute estate was devised to the widow; for the words "give and bequeath" are the equivalent of "devise." *In re Burbank's Will*, 69 Iowa, 378. Is the estate limited to a life interest by reason of the use of the words, "to use and enjoy and manage as she, in her judgment, sees fit?" Conditions or limitations imposed on an absolute devise are strictly construed, and will not be allowed to defeat the estate unless it clearly appears that the testator intended to devise but a qualified estate. Schouler Wills, section 475; *Allen v. White*, 97 Mass. 504. In *Bulfer v. Willigrod*, 71 Iowa, 620, the will read as follows: "I give and bequeath to my beloved wife all my property, both real and personal and mixed, and of every kind and manner, and nature, to use, to her own use and benefit, as she shall deem best for herself and our beloved daughter, Anna M. Kline." Judge Reed, speaking for the court, said: "The present bequest is a devise of all of the property, coupled with the power to make absolute disposition of it. Under the settled rule, it must be regarded as an absolute bequest to her." If the words, "use to her own use and benefit," give power of absolute disposition, surely the words, "to use, enjoy it, and manage as long as she, in her judgment, sees fit," do no less. A devise of property to one, to use and enjoy, is not confined to personal use, unless the context clearly calls for the more limited construction. Such words, as a rule, carry the beneficial estate to the devisee. *Hance v. West*, 32 N. J. Law, 233; *Stone v. North*, 41 Maine, 265. There is nothing to indicate that the testator intended to devise but a life estate to his wife. He does not undertake to dispose of the remainder, and there is every reason to think that he supposed he was disposing of the whole of his property to his wife.

Technical construction corresponds, then, with the testator's intent, and both give the widow an estate in fee. The case is clearly ruled by *Bulfer v. Willigrod, supra*. There should be a decree finding that Eleanor S. Barrett took an estate in fee, and the cause is remanded for that purpose.—REVERSED.

AGNES PETERSON V. ADAMS EXPRESS COMPANY, Appellant.

Negligence: VERDICT: *New trial*. The evidence showed that plaintiff was injured by her horse becoming frightened by defendant's employe removing a black canvas cover from an express wagon while it was standing near a public highway; that he pulled the top towards the rear of the wagon, and that as he did so, and as the center thereof passed over the rear of the wagon, the front of the cover rose in the air. *Held*, not such a failure of evidence as to defendant's negligence as would authorize setting aside a verdict finding defendant guilty of negligence.

CONTRIBUTORY NEGLIGENCE. Where the act of defendant's agent frightened a horse which plaintiff was driving, resulting in her injury, plaintiff cannot be charged with contributory negligence, if she was exercising reasonable care, though the horse was unsafe, providing she did not know it.

Appeal from Montgomery District Court.—HON. N. W. MACY, Judge.

TUESDAY, MAY 22, 1900.

ACTION to recover damages for a personal injury. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed*.

C. E. & P. W. Richards and Smith McPherson for appellant.

J. M. Junkin and Ralph Pringle for appellee.

SHERWIN, J.—The plaintiff was severely injured in September, 1898, in the city of Red Oak. She alleges that

she was driving a single horse along the beaten track of a public street about 5 o'clock in the afternoon, and that at said time one of the defendant's large express wagons was standing in said street, about eight feet distant from the beaten track thereof, and that one of the defendant's servants, while acting within the scope of his authority and within the line of his duty and employment, carelessly and negligently lifted a large top from said wagon, and moved it towards the beaten track on said street, in the direction the plaintiff was traveling, in such manner as to frighten her horse and

cause it to run away. The negligence complained of
1 is the manner of removing the top from the defendant's wagon at the time in question. The top was about eight feet long, four feet wide and five feet high, and was made of bows and slats, and covered with black canvas. One of the defendant's drivers, Combs, was removing it from the wagon without help. He was on the ground at the rear of the wagon, with his back toward the plaintiff, and was pulling the top off backward. When it was partly off, the front end of the top tipped up and frightened the horse. The horse was at the time some eight or ten feet from the top. The plaintiff noticed that the top was being taken off when she was forty or fifty feet south of it, but drove right along the street towards it, her horse trotting. It does not appear whether the driver, Combs, saw her approaching or not. There is evidence tending to show that he might have seen her before he started to pull the top off. The plaintiff had driven the horse about the streets of Red Oak several times prior to her injury, and did not know that it was not a reasonably safe and gentle horse for her to drive. The defendant insists that the whole record fails to show negligence on its part, that it does show contributory negligence on the part of the plaintiff, and that the court erred in giving to the jury instruction No. 7. The specific objection to this instruction is that it told the jury that the plaintiff would

not be justified in driving along the public street with an animal which was known by her not to be reasonably safe and gentle. It is said that this instruction does not announce the correct rule, and that the plaintiff must prove that the animal was reasonably safe and gentle in fact. The contention of the defendant cannot be maintained. Nor do the Iowa authorities cited in support thereof sustain it. They hold that the opinion of the injured party as to whether a certain course was or was not safe was not material. No such question is presented in this case. Here the jury was

2 told, in effect, that the plaintiff would not be guilty of contributory negligence if she did not know that the horse was unsafe, and was herself exercising reasonable care in driving it. The instruction is directly in line with the holding in *Martin v. Town of Algona*, 40 Iowa, 390, and *Gould v. Schermer*, 101 Iowa, 582.

3 There is weight in the defendant's claim that the evidence does not show negligence on the part of Combs in removing the wagon top in the manner and under the circumstances shown. The evidence on this branch of the case is far from satisfactory to us. Still, we cannot say there is such a failure thereof as to warrant us in setting the verdict aside. The jury was properly instructed on the question of plaintiff's contributory negligence, and the evidence fully warranted its finding thereon. The judgment of the district court is AFFIRMED.

DASSIE SANDERS V. JAMES O'CALLAGHAN, Appellant.

Vicious Dogs: INJURY BY: *Elements of action.* In an action for injuries from the bite of a dog, it is not prejudicial error to permit plaintiff to show that the dog had previously bitten other people, though Code, section 2340, provides that the

5 owner of a dog shall be liable to the party injured for all damage done by his dog, except when the party is committing an unlawful act. While the statute does not make the habit of the

111	574
116	624

111	574
1135	214

111	574
143	51
143	329
143	330

animal an element, the vicious character of the dog and the owner's knowledge thereof, were elements in the common-law action for such injuries.

SAME. In an action for injuries from the bite of a dog, it is proper to refuse to instruct that one going on the premises of another without invitation must inquire and ascertain whether
2 vicious dogs are kept there, and that a failure to do so is contributory negligence, especially where evidence showed that plaintiff obtained permission to enter on defendant's premises.

EVIDENCE: *Opinions.* In an action for injuries from the bite of
3 a dog, it is proper to permit plaintiff to testify that she endured pain and suffering from the injuries received, and to
7 permit her witness to be asked as to her suffering and ability to move about after the accident.

SAME. In an action for injuries from the bite of a dog, it is
3 proper to permit plaintiff to show by experts that wounds made by a dog are more painful than those made by clean instruments.

SAME. In an action for injuries from the bite of a dog, where plaintiff claims that she had not fully recovered, and that
3 the wounds were slow in healing, it is proper to permit experts to be asked as to the usual and ordinary effect of dog
4 bites, and the probability of such a wound healing rapidly, or leaving poisonous effects, though there was no evidence that poison was injected into plaintiff's system through the bite.

ON CONTRIBUTORY NEGLIGENCE: *Relevancy.* In an action for injuries from the bite of a dog, it was not error to exclude defendant's evidence that he and his daughter had observed the
6 dog when strangers were on the premises, and that it never offered to bite such strangers as long as they walked about quietly, since such evidence was irrelevant to the issue of plaintiff's contributory negligence.

CONTRIBUTORY NEGLIGENCE: *Jury question.* It was proper, under the evidence, to refuse to instruct, as matter of law, that
8 plaintiff could not recover because of contributory negligence.

INSTRUCTIONS: *EQUIVALENTS.* Where an issue is fully covered by
8 instructions already given, a refusal to give a correct instruction thereon is not error.

PERMITTING CONJECTURE: *Future damages.* In an action for injuries from the bite of a dog, where the evidence as to plaintiff's future pain and suffering is conflicting, it is error to instruct that if the jury find her entitled to recover, her damages are

9 such as arise from pain and inconvenience and the impairment of enjoyment for such time as the same have or may continue, as shown by the evidence, though the jury are also instructed that they cannot allow for pain and suffering not caused by the bite, since the erroneous instructions permit the jury to enter the domain of conjecture as to future damages.

Appeal: TIMELY FILING OF AMENDMENT TO ABSTRACT. Though appellee's amended abstract of record is not filed within the time required by rule No. 22 of the supreme court, appellant's motion
1 to strike it from the files on that ground will be overruled, it appearing that appellant's abstract was not filed in time, and that no prejudice has resulted from the delay in filing the amended abstract.

Appeal from Polk District Court.—HON. C. P. HOIMES,
Judge.

TUESDAY, MAY 22, 1900.

ACTION to recover damages for injuries resulting from the bite of a dog. There was a trial to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

I. Ross Thompson and Read & Read for appellant.

Stewart & Cohen for appellee.

DEEMER, J.—Appellant has filed a motion to strike appellee's amended abstract, because not filed within the time required by our rules. That it was not filed within ten
1 day's after the receipt of appellant's abstract, as required by rule No. 22, is conceded; but, as appellant did not file his abstract within the time required, and as no prejudice has resulted from the filing of the additional abstract, the motion to strike will be overruled. *Clark v. Ellsworth*, 104 Iowa, 442; *Foley v. Association*, 102 Iowa, 272; *Galer v. Galer*, 108 Iowa, 496.

II. While driving along one of the streets in the city of Des Moines, plaintiff "had a call of nature," and con-

cluded to go onto defendant's premises to use his water-closet. Before entering the premises, she asked permission of a woman, who was between the gate and the house, engaged in washing, and was referred to the housekeeper in the house, who granted the permission asked. She passed on to the closet, meeting defendant's daughter on the way, who spoke to her; used the closet; and as she was returning heard a dog growl. Looking back she saw a dog leap over a small fence, and start after her as fast as he could come. Plaintiff screamed to the daughter, who was close by, to catch the dog, but, as nothing was done by the girl, the dog sprang at plaintiff's face. Missing its hold, it then seized plaintiff's ankle, and inflicted the injuries of which she complains. As soon as the dog had fastened itself on plaintiff, the daughter caused it to release its hold, but not until it had inflicted very severe injuries on plaintiff's person. When plaintiff saw the dog coming toward her in a threatening manner, she started to run, and was running, and screaming to defendant's daughter to rescue her, from the time she saw the dog coming over the fence. The dog was chained in a barn immediately west of the closet, but, seeing the plaintiff, he broke his chain, and started after her. Plaintiff's visit to the closet was in the daytime, and she did not know of the presence of the dog until it started in pursuit. There is some dispute in the evidence regarding the manner in which plaintiff passed to and from the closet (some of the witnesses say she was running); as to the time when the daughter intervened (she says she did so immediately); and as to the time when the dog first barked (some of the witnesses saying that it was when the plaintiff started to go towards the closet); but the other facts are practically without dispute. Plaintiff was permitted to show, over defendant's objections, that she endured pain and suffered from the injury she received. We think the

evidence was competent and proper. The fact was material and plaintiff was competent to testify regarding the matter. An expert doctor (called on behalf of plaintiff) was asked whether or not the wound made by a dog was more painful to a patient than one made by a clean instrument, and he answered that it was in every case. The witness was competent, and the question was a proper one. He was also asked this question: "What is the effect on the human flesh of laceration by the teeth of a dog, and its general probability of healing rapidly, or leaving poisonous effects?" Objection was made to this, because the witness had not shown himself competent, and for the further reason that the evidence did not show any poisonous effects from the wound in question, or that plaintiff had suffered any damage on account thereof. Before the witness was permitted to answer, his competency was shown, and he said in response that "a wound of this kind—a lacerated wound by a dog or any other animal—is considered by recent surgeons as being altogether different, and is treated differently, from wounds made by clean instruments, or from wounds made by the surgeon's knife, and for the reason there is more tearing of the tissue." Manifestly, defendant's objection was properly overruled. Another doctor was asked whether such a wound was liable "to get the poison from a dog or other animal in the bite." Objection was made to this question, and the court, instead of ruling, asked this question: "What is the usual and ordinary effect of a dog bite?" Objection was also lodged against this question, but the objection was overruled. The ruling was clearly right. After the witness had fully answered, defendant moved to strike the answer because not responsive. We need not set it out, for it is so clearly responsive to the interrogatory as to demand no further consideration. Although there may have been no evidence that poison was injected into plaintiff's system through the bite, it was claimed that she had not fully

4

recovered, and that the wound was slow in healing. The evidence of these experts was clearly admissible under
5 these issues. Evidence was also offered for the purpose of showing that the same dog had previously bitten other people. This was objected to as immaterial and irrelevant. Code, section 2340, provides that "the owner of a dog shall be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act." While this section was evidently intended to do away with the necessity of proving scienter, still there is no reason for holding that a plaintiff may not prove those things necessary to a right of action at common law. A majority of this court has held that plaintiff in such actions must show his freedom from contributory negligence, in order to recover under this section. *Stuber v. Gannon*, 98 Iowa, 228. But see *Shultz v. Griffith*, 103 Iowa, 150, and *Van Bergen v. Eulberg*, 111 Iowa, 139. Plaintiff's conduct, and her right to be on the premises, were, therefore, in issue. At common law a person was not entitled to keep a vicious dog on his premises for the purpose of keeping off trespassers, provided they came there in the daytime and on some innocent mission. See Cooley Torts (2d ed.), p. 406; *Loomis v. Terry*, 17 Wend. 496; *Conway v. Grant*, 88 Ga. 40 (13 S. E. Rep. 803, 14 L. R. A. 198), and cases cited; *Knowles v. Mulder*, 74 Mich. 202 (41 N. W. Rep. 896). Proof of facts that would make out a case at common law is not prejudicial error. *Marsel v. Bowman*, 62 Iowa, 57; *Cameron v. Bryan*, 89 Iowa, 214. It may be, and doubtless is, true that defendant was absolutely liable if plaintiff was doing no unlawful act, and was not guilty of contributory negligence; but no prejudice resulted from proving a case under the theory of qualified liability. No complaint is made of the court's failure to instruct on that theory. Moreover, the defendant testified that he kept the dog chained up in the day time so that he would not bite people. This was evidence of his vicious character and of defendant's knowl-

edge thereof. *Montgomery v. Koester*, 35 La. Ann. 1091; *Warner v. Chamberlain*, 7 Del. Super. 18 (30 Atl. Rep. 638). In any event, there was no prejudice. Defendant offered to show by himself and daughter that they had ob-

6 served the conduct of the dog when strangers were on the premises, and that he never offered to bite them so long as they walked about quietly, and that he did

not attempt, under such circumstances, to break his chain. The avowed purpose in introducing this evidence was to show "that plaintiff went in there [on the premises], and did not use the premises like persons usually do when they go on the premises of another, and thereby contributed to her own injury." Surely, the evidence offered would neither prove nor tend to prove that plaintiff was guilty of contributory negligence. It was simply an effort to prove a presumption from a presumption. This is all that need be said in this connection. But it appears that defendant did testify that other persons had gone on his premises, and used the closet, as plaintiff did, without provoking or exciting the dog; and another witness testified to the same state of facts without objection. The error, if any, was without prejudice. Moreover, we doubt if the evidence offered would throw any light on the disposition of the dog. The question did not call for that, but for how he acted under certain conditions. *Linck*

v. Scheffel, 32 Ill. App. 17, sustains the ruling.

7 A witness was asked as to plaintiff's ability to get around, and as to her suffering pain after she received her injuries. Those questions were proper. *Bailey v. City of Centerville*, 108 Iowa, 20.

III. Defendant asked six instructions bearing on plaintiff's conduct in the case, that were each and all refused. One of them was to the effect that plaintiff could not recover because guilty of contributory negligence. Conceding

8 that plaintiff must show freedom from contributory negligence, it was clearly a question for the jury, and was submitted under proper instructions. Another was to

the effect that one going on the premises of another without invitation must inquire and ascertain whether or not vicious dogs are kept thereon, and, if he goes on without permission or invitation, and without ascertaining whether there be vicious dogs on the premises, he is guilty of contributory negligence. This was rightly refused,—*First*, because plaintiff went on the premises with permission of the person in charge; and, *second*, because it announces an incorrect rule of law. *Sherfey v. Bartley*, 4 Sneed, 58 (67 Am. Dec. 597); *Pierret v. Moller*, 3 E. D. Smith, 574; *Meibus v. Dodge*, 38 Wis. 300; and *Loomis v. Terry*, *supra*. Others related to contributory negligence, but as that issue was fully covered by the instructions given, no prejudice resulted, even if it be conceded that the instructions asked embodied a correct rule. But we do not think the rules announced therein were correct.

IV. The fourth instruction reads as follows: "If you shall find that plaintiff is entitled to recover, it will be necessary for you to determine the amount of such recovery. She can in no event recover more than compensatory damages, by which is meant such sum as will fairly compensate her for the injury sustained. What is a just compensation is not susceptible to proof by direct evidence, but must, of necessity, be left largely to the sound judgment and discretion of the jury, guided by the circumstances of the case as shown in evidence. The damages for which she is entitled to recover, if you find that she is entitled to recover, are such as are caused by bodily pain and suffering, distress
9 and mental anguish, and inconvenience, the impairment of the enjoyment of life, by reason of the injury, and for such pain and inconvenience and impairment of enjoyment for such time as the same has or may continue, as shown by the evidence. But you can in no event allow her more than \$3,000. Nor can you allow for pain or suffering not caused by the biting of the dog." That part italicized is said to be erroneous. An almost identical instruction was

disapproved in *Ford v. City of Des Moines*, 106 Iowa, 94. See, also, *Fry v. Railroad Co.*, 45 Iowa, 416. But it is said that this case is distinguishable from that in this: that the jury was told that it could not allow anything for pain and suffering not caused by the bite of the dog. We do not see how this can be said to have cured the error contained in the other part of the instruction, permitting the jury to recompense plaintiff for such pain, inconvenience, and impairment of enjoyment * * * *as may continue*, as shown by the evidence. The difficulty with the instruction is that it permitted the jury to enter the domain of conjecture as to future suffering. In that respect it is identical with the *Ford Case*. In *Bailey v. City of Centerville* the instruction used the word "probably," instead of "may," and it was held synonymous with "reasonably certain." None of the cases relied on by appellee are in point. Neither *Morris v. Railroad Co.*, 45 Iowa, 29, nor *Russ v. The War Eagle*, 14 Iowa, 371, nor *Miller v. Boone County*, 95 Iowa, 11, involved the question here presented. In *Kendall v. City of Albia*, 73 Iowa, 241, the rule in *Fry's Case* was approved, but the case was affirmed because of an instruction requiring plaintiff to show by the evidence that future damages "will probably be sustained." This is in line with the *Bailey Case*. The evidence as to future pain and suffering in the instant case was conflicting, and the jury should have been properly instructed with reference thereto.

V. One other question is presented in argument, but, as it cannot arise on a retrial, we do not consider it. For the error pointed out, the judgment is REVERSED.

DANIEL H. TALBOT, Appellant, v. SIOUX NATIONAL BANK
OF SIOUX CITY, IOWA.

National Banks: USURY: Limitation of actions. Under Revised Statutes United States, section 5198, providing that twice the amount of unlawful interest paid may be recovered if action be commenced therefor within two years from the time of payment, where such action was not begun till five years after payment the cause of action was barred.

Appeal from Woodbury District Court.—HON. GEORGE W.
WAKEFIELD, Judge.

TUESDAY, MAY 22, 1900.

ACTION to recover usury, under section 5198 of the Revised Statutes of the United States. A demurrer to the petition was sustained. Plaintiff appeals.—*Affirmed.*

D. H. Talbot in pro per.

J. S. Lothrop for appellee.

SHERWIN, J.—In his petition the plaintiff avers that he commenced doing business with the defendant bank about May 27, 1899, and that on the twenty-fourth day of February, 1890, he gave the defendant one ten thousand-dollar note, in which was included usurious interest which the bank had charged the plaintiff; that on the fourth day of March, 1890, the plaintiff executed and delivered to the defendant his note for twenty-eight thousand dollars; that said note was given to cover borrowed money, the ten thousand-dollar note of February 24, 1890, and illegal interest and charges which the bank had before made against the plaintiff. The defendant demurred to the two counts of the petition alleging the cause of action herein stated. Several grounds were stated in the demurrer,—among others, that the statute of

limitations had run against plaintiff's claim. The demurrer was sustained generally, and, the plaintiff electing to stand on his pleadings, the cause, as to the claim made in counts 1 and 2 of the petition, was dismissed. The twenty-eight thousand-dollar note was never paid by the plaintiff. A land mortgage was given to secure it, and that was foreclosed in Plymouth county, Iowa, and a decree rendered against the plaintiff thereon May 6, 1891. The land covered by this mortgage was sold some time thereafter,—just when, does not certainly appear, but it was more than two years prior to the commencement of this action. Section 5198 of the Revised Statutes of the United States provides for the recovery back of twice the amount of unlawful interest paid, if the action therefor be commenced within two years from the time the usurious transaction occurred. This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred, and the demurrer for that reason was properly sustained. There was no error in striking a part of the prayer from the third count of the petition. The judgment is AFFIRMED.

LADD, J., took no part.

IN THE MATTER OF THE ESTATE OF JOSEPH C. MYERS, Deceased. W. H. MYERS, Claimant, Appellant, v. MARY A. B. MYERS, Executrix.

Evidence: WHAT IS NOT SECONDARY. Where plaintiff, suing for the
2 possession of a drug business as surviving partner, claimed
that he had placed it in the hands of defendant's testator,
under an agreement that he was to have an interest in the
3 profits for his services, it was not error to allow defendant's
witness, after testifying that she had read all the correspondence
between testator and plaintiff, to testify in the negative,
over objection, in answer to defendant's question whether any
business matter was mentioned in any of plaintiff's letters to
testator, except one read to the jury in which plaintiff had

asked to borrow money, since such question did not call for the contents of the letters, but only for their subject matter, which was admissible for the purpose of identification.

HARMLESS ERROR. It appearing that another witness was permitted,
4 without objection or contradiction, to testify to the same fact, error, if any, in admitting the testimony was harmless.

BOOKS AND PAPERS. Where plaintiff sued to recover a drug business, which he claimed he had intrusted to his brother under an agreement that the brother was to receive a share of the
10 profits for conducting the business, which the brother's executrix claimed had been purchased from plaintiff, the books and papers used therein were admissible to show the manner of conducting the business.

HARMLESS ERROR. Though it was error to allow decedent's executrix to introduce an item in the ledger used in the business which plaintiff claimed to have intrusted to her decedent, and which the executrix claimed he had purchased from plaintiff, for the purpose of showing cash payment to him, such error was harmless, where plaintiff admitted receiving the money.

RELEVANCY. In an action to recover possession of a drug business, it was error to refuse to allow plaintiff to answer the question
6 what he did with the business when he removed to another state, though he admitted that defendant's testator was in apparent charge thereof after his removal, since the *supervision* of the business might have been intrusted to another person.

CROSS-EXAMINATION. Where plaintiff claimed that he left a valuable stock of drugs with his brother on removing from the state, under an arrangement by which the brother was to share in the profits in return for his services, it was not error
7 to allow defendant to ask plaintiff, on cross-examination, whether he had not run off to another state, leaving attached property, since such evidence tended to show plaintiff's financial condition at the time of removal.

SAME. Where, in an action to recover a stock of goods which plaintiff claimed he had left in the possession of defendant's testator, plaintiff had testified that he had sold his horse, and
8 that his buggy had been stolen, it was error to allow defendant to ask him if he was not the man that stole the buggy, and whether it had not been so charged at the time, since such question was irrelevant and prejudicial.

SAME. Where plaintiff sued to recover a drug business, an interest in which defendant claimed her testator had purchased

at the time of plaintiff's removal from the state, it was error to allow defendant, on cross examination, to ask plaintiff's
9 witnesses, testifying that testator had no means at that time, if testator had not advanced money to their husbands; it appearing that the money had been advanced by him some years' after the date of the alleged purchase.

Appeal: DENIAL IN ARGUMENT. A denial of the correctness of ap-
1 pellant's abstract in the argument on appeal will not be considered.

SHOWING ERROR TO BE PREJUDICIAL. Though the appeal record in an action against a decedent's estate showed that an objection had been made and sustained to the testimony of plaintiff's
5 wife at the close of her direct examination, on the ground that she was incompetent to testify to personal transactions with the decedent, yet where her testimony was permitted to stand, and the ruling was not made effective, plaintiff showed no prejudice thereby.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

TUESDAY, MAY 22, 1900.

APPELLANT filed in the court below a petition for an order on the executrix to turn over to him certain property of the estate, consisting of a stock of drugs, paints, wall paper, etc. Defendant holds said property under the will of her deceased husband, J. V. Myers, as a part of his estate. Plaintiff claims a co-partnership with J. V. Myers, and seeks to obtain possession as surviving partner. There was a trial to jury, verdict and judgment for defendant, and plaintiff appeals.—*Reversed.*

Preston & Moffit and *Rickel & Crocker* for appellant.

C. W. Kepler for appellee.

WATERMAN, J.—The denial of appellant's abstract is not sufficiently specific to put its correctness in issue. We

cannot regard denials made in argument. *McGillivray v.*

Case, 107 Iowa, 17. A brief recital of some of the
1 facts, together with the claims of the respective
parties, will shed light on the points presented. The
drug business was carried on in Mt. Vernon, in this state,
originally in the name of Myers Bros. Plaintiff, who is
a brother of J. V. Myers, formerly resided there, but
2 since the year 1877 has lived in Nebraska, and from
that time up to his brother's death, in 1896, was in
Mt. Vernon but twice, the last time in 1880, and on each
occasion made but a brief stay. He claims that he owned
the stock in trade; that J. V. Myers at first clerked for him,
and that the trade name of Myers Bros. was one which he
assumed. When he left Mr. Vernon, in 1877, as he asserts,
he placed the business in charge of his brother, giving him an
interest in the profits in return for his services. On the
other hand, defendant asserts that her husband had a interest
in the stock as a partner during the period the business was
conducted in the name of Myers Bros., and she claims that
at the time plaintiff removed to Nebraska she purchased his
interest in the business which has since been conducted under
the firm name of J. V. Myers & Co., she being the unnamed
member of the firm. With this introductory statement, we
pass to a consideration of the errors assigned.

I. One Kittie B. Spring, examined on behalf of the
executrix, testified that she was in charge of the store since
1882; that she had access to books and papers, and
had read all correspondence between plaintiff and J.
3 V. Myers. She was then asked this question: "I
will ask you to state whether in any of those letters
received by J. V. Myers from his brother Wesley any matter
of business was mentioned save and except this letter that he
writes asking to borrow money, that I have just read to the
jury?" Over plaintiff's objection, this was answered in the
negative. It is urged here that the letters were the best
evidence of their contents. This question does not call for

the contents of the letters, but only for their subject-matter, presumably for the purpose of identification. For this purpose it was admissible. *Rosenberger v. Marsh*, 108 Iowa, 47; *State v. Seymore*, 94 Iowa, 699; *Hagan v. Insurance Co.*, 81 Iowa, 321-333. The period included by this question covered a number of years. Quite likely the letters were numerous. There is no rule of law that required the submission of each of them to the jury in order to determine whether it contained anything relevant to the case.

4 Furthermore, another witness for the defendant was permitted, without objection to testify to this same fact, and the testimony is uncontradicted; so the error, if there was one, was without prejudice.

II. Plaintiff's wife was a witness in his behalf, and at the close of her direct examination objection was made to her testifying, on the ground that she was incompetent to testify to personal transactions with the deceased.

5 The record shows that the objection was sustained, but the testimony given was permitted to stand. The ruling does not seem to have been made effective in any way, and plaintiff was therefore not prejudiced, if, as claimed, the testimony was admissible.

III. Plaintiff was asked, when on the witness stand, what he did with the drug store when he went to Nebraska. The question was ruled out on objection. The witness should have been allowed to answer. While it is
6 admitted that J. V. Myers was in apparent charge of the store after plaintiff left it may be that supervision of the business was given, or claimed to have been given, to some other person. In the partial answer made to the question, it appears that this was the case.

IV. On cross-examination plaintiff was asked whether he had not run off to Nebraska in 1876, leaving some property, which was attached. His reply was that he did not run off, but that a team of horses was attached. The tes-
7 timony was not objectionable, under the peculiar circumstances of this case. It tended to show plaintiff's

financial condition at a time when he permanently removed from the state, leaving, as he now insists, behind him, a valuable stock of goods. But there was no warrant
8 for another portion of the cross-examination to which objection was made. Plaintiff had said he sold his horses, and that his buggy was stolen. He was then asked: "Wasn't you the man that stole it, and was so charged at the time?" The matter was wholly irrelevant, and the reflection upon the witness must have been prejudicial.

V. It was a part of plaintiff's case to show that J. V. Myers had no means at the time it is claimed he purchased an interest in the stock of goods in question. Two witnesses

(Clingman and Giddings) testified to this fact.
9 On cross-examination, defendant's counsel was permitted to ask them if J. V. Myers had not advanced considerable money to their husbands for certain purposes. Had these transactions related to the time when the stock is claimed to have been purchased, the evidence would have been admissible, but it had reference to matters occurring some years later, and should therefore have been excluded.

VI. We may dispose of most of the objections to the reception in evidence of books of account by saying that it was proper for defendant to show in what manner and in whose name the business was in fact conducted. One ledger
10 item showing a cash payment made by J. V. Myers for plaintiff was introduced over plaintiff's objection. It is insisted that a merchant's books of account are not ordinarily competent to show a payment of money. If the receipt of this evidence was erroneous, it worked no prejudice; for plaintiff admitted decedent had paid the money. We may add here, to cover other points raised, that none of the books or papers were offered to establish an account against plaintiff, but only to show the manner in which the business was carried on. Had Myers been alive, he could have testified to this fact; being dead, we cannot see why the books may not speak for him to the same effect. We need not

notice specially the other objections made to the evidence; none of them seem to us well taken. Some other exceptions are argued, but, as they relate to matters which are not likely to arise on another trial, we do not feel called upon to specially notice them. For the reasons given, the judgment is REVERSED.

FRED MILLER BREWING COMPANY v. CAPITAL INSURANCE COMPANY, Appellant.

111	590
112	607

111	590
121	681
122	350

111	590
133	590

111	591
135	78

Interpretation of Foreign Constitution and Statutes. In the interpretation of the statutes and constitution of a sister state the courts will follow the decisions of the court of last resort of such state.

Foreign Judgment: RECOGNITION IN SISTER STATE. Where a court of a sister state acquires jurisdiction over the defendant and subject matter of a suit, and a procedure valid in such state is followed, the judgment will be recognized in other states as binding on the parties thereto.

RULE APPLIED. A Wisconsin judgment, entered by the clerk of court, in a default case, on the filing of the summons and complaint and proof of service of summons, and that no answer or demurrer had been filed, as authorized by Revised Statutes Wisconsin, section 2891, is entitled to due recognition in the courts of sister states, as it is a judicial act within the meaning of the constitution of the United States.

Wisconsin Default Judgment: VALIDITY. Revised Statutes Wisconsin, section 2891, authorizes the clerk of court to enter judgment of default in an action on contract, for money only, when the plaintiff files with the complaint and summons proof of service of the summons and that no demurrer or answer has been filed. Section 2633 provides that, if a copy of the complaint was not served with the summons, the defendant can obtain one by a demand in writing. A summons was served on November 2, 1888, and was filed with the clerk November 10, 1888. On December 31, 1899, plaintiff filed a complaint and proof of the service of the summons, and proof that no answer or demurrer was filed; and judgment was entered. No copy of complaint was served on defendant. *Held*, that such judgment was valid.

Is CONSTITUTIONAL. Revised Statutes Wisconsin, section 2890, authorizing the clerk of the court to enter judgment in cer-

tain default cases, is not in conflict with the provision of the
9 Wisconsin constitution vesting the judicial power in certain
12 courts, as the judgment is to be treated as rendered by the
court.

SAME. In an action on a foreign judgment the court will not
6 inquire whether the original action was by or against all the
3 proper parties.

MOTION TO CHANGE PLACE OF TRIAL TO PROPER COUNTY: *Not essential
to validity of judgment.* Where there was no motion made to
remove a case commenced in the wrong county in Wisconsin
2 to the proper county, as authorized by Revised Statutes Wis-
consin, section 2621, a judgment entered in the county where
the suit was brought was valid.

FAILURE TO OBJECT: *Waiver.* Where a judgment was within the
5 facts of the complaint, and a defect of parties was apparent
on its face, it was waived by a failure to object.

BEGINNING OF SUIT BY ISSUING SUMMONS: *Statute of limitations.*
Under Revised Statutes Wisconsin, section 4240, providing
that an attempt to commence an action by delivering a summons
to an officer for service shall be equivalent to a commence-
ment thereof within the meaning of the provision of law lim-
7 iting the time for the commencement of an action, an action
on a fire policy which provides that action shall be instituted
in six months after loss, is commenced in time when the
summons was issued before, but was not served till after the
expiration of such time.

LIMITATION BY CONTRACT: *Is matter for defense.* Where a fire
policy limits the time for commencing action thereon, it is
8 not necessary that the complaint should allege that it was
commenced within such time, as this limitation is a matter of
defense.

Mortgages; LOSS BY FIRE PAYABLE TO MORTGAGEE. Where a mort-
gagor and mortgagee had stipulated that the loss payable
4 under a fire policy should go to the mortgagee, judgment in
an action thereon should be awarded to the mortgagee.

Appeal from Polk District Court.—HON. T. F. STEVENSON,
Judge.

WEDNESDAY, MAY 23, 1900.

ACTION on a judgment rendered in the circuit court of
Milwaukee county, Wis. From judgment as prayed the de-
fendant appeals.—*Affirmed.*

Cummins, Hewitt & Wright and C. E. Campbell for appellant.

Dudley & Coffin for appellee.

LADD, J.—The facts out of which this action grew are detailed in *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa, 31, which was followed in reversing judgment for the defendant on the former hearing. *Same v. Capital Insurance Co.*, (* — Iowa), 63 N. W. Rep. 568. Service of the summons on Winchester was there held to have conferred jurisdiction on the circuit court of Milwaukee county to enter judgment against the defendant. It will be remembered, however, that such service was had in Clark county, of that state, November 2, 1888, and that the summons, with the return of service, was filed with the clerk in Milwaukee county on the tenth
1 of that month. On the thirty-first day of December, 1889, the complaint, duly verified, with the affidavit of plaintiff's attorney, that no answer or demurrer had been received, was presented to the clerk, and judgment thereupon entered. This was in pursuance of section 2891 of the statutes of that state: "Judgment may be had if the defendant fails to answer the complaint as follows: In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk, with the summons and complaint, proof of personal service of the summons on one or more of the defendants, and that no answer or demurrer has been received, or if any such has been received, that the same has been struck out by order of the court or a judge; and that no answer or demurrer has been received, and the time granted by an order therefor has expired. If the complaint be duly verified, the clerk shall thereupon enter judgment for the amount demanded in the complaint, against such defendant or defendants, or against one or more of the several

*Not officially published.—REPORTER.

defendants in the case provided for in section 2884." Under the practice statute of Wisconsin the court acquired jurisdiction from the time of service of the summons (section 2626), which, among other things, necessarily designated the postoffice address of plaintiff or its attorney, at which place papers in the case might be served. Section 2630. The statute did not require service of the complaint, but, if this were omitted, the defendant might, within twenty days from the service of the summons, demand a copy thereof, which must be served on him within twenty days thereafter. Section 2633. "The summons must be filed with the clerk, and a state tax on the action of \$1 paid, within ten days after the service of an answer or demurrer, or, if no answer or demurrer be served, at the time of applying for judgment." Section 2642. So that the summons, in the absence of an answer or demurrer, was not necessarily filed with the clerk until the time judgment was entered. Nor do these statutes seem to contemplate the filing of a complaint until that time. Provision for copies by the adverse party, rather than information from the court records, as in this state, is made; and it plainly appears from section 2898 requiring that, "the clerk, immediately after entering the judgment, shall attach together and file * * * the summons, pleadings, or copies thereof, proof of service, and that no answer or demurrer has been received," that it is not until then these papers are necessarily filed with him. As the affidavit must show no answer or demurrer to have been received, the inference is clear that the time within which the copy of the complaint may be demanded and an answer or demurrer served must elapse after service of the summons before judgment may be demanded by the complainant, and this, at the most might not exceed forty days. So there is nothing in the contention that relief could be had at any time subsequent to the service of summons. Nor is there any analogy between these statutes and the section of our Code requiring the petition to be on

file ten days before term time. For this reason the presumption cannot be indulged that, in the absence of a statute in Wisconsin fixing the period during which the complaint shall be on file with the clerk, the law is like that of this state. The differences are manifest. Here judgment may not be entered in vacation except by agreement, nor by the clerk unless on the order of the court. There the practice favors the formation of issues in vacation, and also the disposition of all causes in which a money judgment is the only relief sought, without the interposition of the judge whenever it is legally apparent there will be no contest.

II. But it is urged that the action was begun in the wrong county. True, the summons was served in a county other than where the judgment was entered. Even though it should have been commenced in Clark county, under the laws of Wisconsin, as in Iowa, in the absence of a request by the defendant for a change of venue it might be prosecuted to judgment where brought. Section 2621 of the statute of Wisconsin, in part, reads: "When the county designated in the summons or complaint in any action is not the proper place of trial thereof, the defendant may, within twenty days after the service of the complaint, serve upon the attorney for the plaintiff a demand in writing that the trial be had within the proper county, specifying it, unless there be more than one such county, and a reason therefor. Within five days after service of such demand the plaintiff's attorney may serve a written consent that the place of trial be changed, and specifying to what county, having the option to name one or two or more, in which it may be properly triable, and such consent shall change the place of trial accordingly. If the plaintiff's consent be not so served, the defendant may, within twenty days, after the service of his demand, move to change the place of trial, and shall have costs if his motion be granted." It is evident that no consent was given or motion filed, else the judgment would not have been rendered in Milwaukee county. A situation will not be assumed, in the

absence of proof, to defeat the acts of an officer apparently clothed with authority, and discharging duties imposed upon him by statute. The service of the complaint could not have been more than forty days after that of the summons, and twenty days yet remained during which a motion might have been addressed to the court. But no such motion was included in the judgment roll. We are satisfied that no objection to the venue was interposed.

III. The appellant also contends that in no event might the plaintiff maintain the action. One Maier owned the property insured, and the loss, if any, was made payable to Fred Miller, mortgagee, as his interest might appear. The mortgage had been assigned to the plaintiff before the fire. The complaint alleged these facts, compliance with all the conditions of the policy on the part of the insured, and that the amount due on the mortgage exceeded the face of the policy. In *Hammel v. Insurance Co.*, 50 Wis. 244 (6 N. W. Rep. 805), decided in 1880, the supreme court of Wisconsin held that the mortgagee to whom the loss under an insurance policy was payable as his interest might appear might maintain an action thereon without joining the assured as a party plaintiff. This decision stood unchallenged, save by the dissent therein filed, until 1893, when it was overruled, the court holding that the mortgagee, under such circumstances had not sufficient interest to entitle him to recover. *Williamson v. Insurance Co.*, 86 Wis. 393 (57 N. W. Rep. 920); *Carberry v. Insurance Co.*, 86 Wis. 323 (56 N. W. Rep. 920); *Chandos v. Insurance Co.*, 84 Wis. 184 (54 N. W. Rep. 390). We need not inquire what might have been the outcome had this case been appealed in 1888, on the theory suggested that the personnel of that court had not so changed until 1891 as to remove the majority concurring in *Hammel v. Insurance Co.* in 1880. It is enough to say that until that decision was overruled it was at least a mooted question in that state whether the mortgagee could maintain

an action without joining the assured as party plaintiff, and necessarily to be determined by the trial court.

3 The circuit court of Milwaukee county had acquired jurisdiction of the parties and of the subject-matter, and was, therefore, clothed with the power to determine whether all the parties necessary for the adjudication were before it. If it should be admitted that its conclusion was erroneous, this may not be taken advantage of in a collateral attack. Correction must necessarily have been sought through appeal or other appropriate procedure according to the laws of Wisconsin. The mortgagee was certainly

4 a proper party plaintiff; and, even had the insured been joined, under the allegations of the petition, confessed by default to be true, the judgment must necessarily have been awarded to this plaintiff. Why? Because both had stipulated the loss should be so applied. See *Mershon v. Insurance Co.*, 34 Iowa, 87; *Bartlett v. Insurance Co.*, 77 Iowa, 86; authorities collected in 11 Enc.

5 Pl. & Prac. 395. The judgment was strictly within the facts of the complaint, and the defect of parties, if such there was, patent on its face, and waived by making no objection. *Melick v. Bank*, 52 Iowa, 94; *Hefner v. Insurance Co.*, 123 U. S. 751 (8 Sup. Ct. Rep. 337, 31 L. Ed. 309). To uphold a judgment by default it is not essential that the petition be free from defect. In *Bosch v. Kassing*, 64 Iowa, 312, this court declared "that a defendant may be concluded by a default when the facts stated in the petition do not constitute a good cause of action in law, or when the petition is so defective as to be vulnerable to demurrer." See *Johnson v. Mantz*, 69 Iowa, 710. Judgments beyond the pleadings even have been adjudged erroneous, and not void. *York v. Boardman*, 40 Iowa, 57; *Traer v. Whitman*, 56 Iowa, 443. As stated in an early Ohio case: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a cause is presented that brings this power into action. But, before the power can be affirmed to exist,

it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected." *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Spoors v. Coen*, 44 Ohio St. 497 (9 N. E. Rep. 135); *Reed v. City of Muscatine*, 104 Iowa, 183; *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735 (55 N. W. Rep. 218). "It is of no avail," remarked Justice Miller in *Cooper v. Reynolds' Lessee*, 10 Wall. 316, 19 L. Ed. 932, "to show that there are errors in the record, unless they be such as to prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power." The

6 Wisconsin court acquired jurisdiction to decide who were necessary parties, and the correctness of its conclusions may not be again investigated in this proceeding.

IV. The summons was served October 13, 1888, or more than six months after the fire, which occurred March 30th of that year. It was stipulated in the policy that "no
7 suit or action upon this policy for the recovery of any claim shall be sustainable in any court of law or equity unless commenced within six months next ensuing after the fire." Under the decisions of Wisconsin this period is computed from the time of the fire (*Hart v. Insurance Co.*, 86 Wis. 77 (56 N. W. Rep. 332), and not from the accruing of the right to sue, as in this state (*Read v. Insurance Co.*, 103 Iowa, 310). Something is claimed for section 4240 of the statutes of that state, which provides that "an attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of any provision of law which limits the time for the commencement of an action, when the summons is delivered with the intent that it shall be actually served, to the sheriff or to the proper officer of the county in which defendants, or one of them, usually or last resided." This must be followed by service within sixty days. The attempt to commence the action within six months was proven. *Town of Woodville v. Town of Harrison*, 73 Wis. 360 (41 N. W.

Rep. 527). It is insisted, however, that this statute has reference alone to the rights of parties under the statute of limitations, and that under a special contract limiting the time within which suit must be brought the general rule obtains that "a civil action * * * shall be commenced by the service of a summons." Section 2629. Such is the holding in this and other states. *Proska v. McCormick*, 56 Iowa, 318; *Insurance Co. v. Hocking*, 130 Pa. Sup. 170 (18 Atl. Rep. 614); *McElroy v. Insurance Co.*, 48 Kan. Sup. 200 (29 Pac. Rep. 478). But it was unnecessary to aver in the petition that the summons was served within the period fixed. That must necessarily be determined from an inspection of the return of service and proof of the date of the fire. The limitation in this contract, like that of the statute, does not affect the liability, but relates solely to its enforcement. While a part of the contract, it has sole reference to the remedy, and, like the statutory limitations, when interposed as a defense, is in the nature of a plea in confession and avoidance. That it may be waived is well settled (*Garretson v. Insurance Co.*, 65 Iowa, 468; *Horst v. Insurance Co.*, 73 Tex.. Sup. 67, 11 S. W. Rep. 148; *Martin v. Insurance Co.*, 44 N. J. Law, 485), and excuses may exist for not bringing suit within the time stipulated (*Semmes v. Insurance Co.*, 13 Wall. 159 (20 L. Ed. 490); *Killips v. Insurance Co.*, 28 Wis. 472; *Day v. Insurance Co.*, 81 Me. 244 (16 Atl. Rep. 894)). We refer to these authorities to show that reasons exist for requiring the limitation by contract to be set up as an affirmative defense quite as strong as in the case of limitations by statute; as essential in order to enable the plaintiff in the one case to obviate the limitation in a contract by proof of waiver or excuse as in the other to bring himself within some exception of the statute. While the point has never been determined in this state, an examination of the cases discloses the uniform practice of the defendant interposing the plea. We deem it an affirmative defense, available to the defendant

as a personal privilege, and waived by permitting default to be entered. *Insurance Co. v. Fish*, 71 Ill. 620; 4 Joyce, Insurance, section 3223; *Barber v. Insurance Co.*, 16 W. Va. 658.

V. Again, the appellant asserts that the statutes of Wisconsin authorizing the clerk of court to enter judgment in vacation is in contravention of the constitution of that state vesting the judicial power in certain enumerated courts. That question was set at rest in the early case of *Wells v. Morton*, 10 Wis. 468, though by a divided court, and for nearly forty years the practice has been unchallenged. The conclusion reached was that "the judgment, though in fact entered by the clerk, is, in consideration of law, what it purports on its face to be, the act and determination of the court." On the same theory a judgment entered on confession has been adjudged valid in this state. "Though entered by the clerk, it is not to be treated as a judgment rendered by him, but by the court, and is subject to revision in this court in the same manner as any other judgment of the district court." *Edgar v. Greer*, 7 Iowa, 138; *Grattan v. Matteson*, 54 Iowa, 232; *Kendig v. Marble*, 58 Iowa, 529; *Risser v. Martin*, 86 Iowa, 396. The construction given its statutes and the interpretation of its constitution by the highest court of a state will, under all ordinary circumstances, be followed by the courts of a sister commonwealth. *Glos v. Sankey*, 148 Ill. 555 (36 N. E. Rep. 631, 23 L. R. A. 665); *Hunt v. Hunt*, 72 N. Y. 217; *Gilchrist v. Land Co.*, 21 W. Va. 115; *Burgess v. Seligman*, 107 U. S. 20 (2 Sup. Ct. Rep. 10, 27 L. Ed. 359); *Bucher v. Railway Co.*, 125 U. S. 555 (8 Sup. Ct. Rep. 974, 31 L. Ed. 795); *Goodnow v. Wells*, 67 Iowa, 654. This is especially true with respect to the practice in courts, for the vital inquiry is not whether a mistake has been made in construction or interpretation, but whether, under the law as there administered, a valid judgment was rendered. Under the constitution of the United States and the acts of

congress the records and judicial proceedings of Wisconsin, when properly authenticated, are entitled to such faith and credit in this state "as they have by the law or usage in the courts of the state from whence the said records are or shall be taken." The supreme court of the United States, in *Pennoyer v. Neff*, 95 U. S. 714 (24 L. Ed. 565), after exhaustive consideration of the matter, said: "In the earlier cases it was supposed that the act gave to all judgments the same effect in other states that they had in the state where rendered, but this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject-matter." See, also, *Machine Co. v. Radcliffe*, 137 U. S. 287 (11 Sup. Ct. Rep. 92, 34 L. Ed. 670); *Hilton v. Guyot*, 159 U. S. 113 (16 Sup. Ct. Rep. 139, 40 L. Ed. 95). The circuit court of Wisconsin having acquired jurisdiction over the defendant and the subject-matter, the procedure peculiar to that state, if valid there, must be recognized as binding on the parties here. Such was our conclusion in *Greasons v. Davis*, 9 Iowa, 219, where transcripts of judgments rendered by a prothonotary in Pennsylvania in accordance with the usages of that state were held entitled to full faith and credit in Iowa, although not conforming to the practice in this state. See, also, *Taylor v. Runyan*, 3 Iowa, 474; *Crafts v. Clark*, 31 Iowa, 77; *Kingman v. Doane*, 31 Iowa, 400; *Clemmer v. Cooper*, 24 Iowa, 185; *Pollard v. Baldwin*, 22 Iowa, 332.

VI. Lastly, it is said the proceedings had before the clerk were not judicial in character, and for this reason the judgment rendered is not within the provisions of the constitution of the United States, nor entitled to recognition as such under the law of nations. The practice of allowing clerks and prothonotaries to enter

judgments by default and on confession in vacation without direction of court or judge is of very ancient origin, dating back to near the time when written were substituted for oral pleadings. It now prevails in many states, where judgments so rendered are treated as those ordered by the court. They are subject to correction on appeal or by motion, and until corrected are as much a verity as though the court had rendered them. *McConkey v. McCrankey*, 71 Wis. 576 (37 N. W. Rep. 822). As already observed, the judgment is, under *Wells v. Morton*, *supra*, "in consideration of law, what it purports to be on its face, the act and determination of the court." In *Kipp v. Fullerton*, 4 Minn. 473, in speaking of a judgment entered by the clerk, the court said: "I can see no difference as to the effect of a judgment whether it be rendered directly by the court itself or indirectly through its clerk. In either case it is the judgment of the court; otherwise, a judgment entered by the clerk is a mere nullity, for under our constitution he is vested with no judicial power. We must, therefore, presume, when the clerk is authorized to act in such capacity, that his action is the action of the court, and that in such instance he merely enters in form the inevitable sentence or decision of the law, resulting from certain ascertained facts." To the same effect, see: *Henrich v. Englund*, 34 Minn. 395 (26 N. W. Rep. 122); *Crawford v. Beard*, 12 Or. 447 (8 Pac. Rep. 537); *Bond v. Pacheco*, 30 Cal. 530; *Tool Co. v. Prader*, 32 Cal. 634 (91 Am. Dec. 598); 2 Freeman Judgment, section 575. The authorities holding that a judgment of a state court having jurisdiction of the parties and subject-matter should have the same credit, validity, and effect in every other court in the United States as it had in the state where it was pronounced are very numerous, and without conflict. This judgment was valid, as we have seen, in Wisconsin, and under this rule must be so regarded in this state. It is not important to inquire what was the character of the clerk's acts,—whether purely ministerial or in part judicial. Full opportunity for the

correction of any error was afforded under the practice of that state, and the defendant ought not to be permitted to avail itself of any there may have been to defeat an action on a judgment which might be enforced against its property if found there. In *McLaren v. Kehler*, 23 La. Ann. 80 (8 Am. Rep. 592),—a similar action,—the court concluded that: “If the judgment is conclusive in Wisconsin, it is equally conclusive in Louisiana. The courts of this state are estopped from all inquiry into its correctness, and are precluded from considering issues.” *French v. Pease*, 10 Kan. 53; *Swift v. Stark*, 2 Or. 97 (88 Am. Dec. 463); *Cook v. Thornhill*, 13 Tex. 293 (65 Am. Dec. 63. Such has been the conclusion in other states with respect to judgments entered by clerks. *Coleman v. Waters*, 13 W. Va. 278; *Taylor v. Smith* (Tenn. Ch. App.) 36 S. W. Rep. 970; *Knapp v. Abell*, 10 Allen, 485. *Greasons v. Davis*, 9 Iowa, 219, is decisive of the question. As the judgment is valid in Wisconsin, under the acts of congress, it must be so regarded here. —AFFIRMED.

JOSEPH MARPLE, Appellant, v. J. L. IVES.

111 602
1125 386

Sale: ACCEPTANCE: *Broker's commission.* Plaintiff, employed by defendant to find a purchaser for a stock of goods, found a person who was willing to buy if real estate which he had was accepted in payment. Defendant made a written proposition, in which he agreed to accept such real estate in part payment, 2 provided the purchaser, among other things, furnished an abstract showing title in him. The purchaser accepted the offer, but failed to furnish an abstract. *Held*, that the acceptance was not such as to entitle plaintiff to his commission, as having found a purchaser able and willing to buy on the terms proposed.

Evidence: SUSTAINED OBJECTION: *Error without prejudice.* Though objections to questions are sustained, no prejudice results to 1 the party propounding them where the witness answers, and his answers are allowed to stand.

Appeal from Polk District Court.—HON. T. F. STEVENSON,
Judge.

WEDNESDAY, MAY 23, 1900.

ACTION to recover commission for negotiating the sale of property for defendant. At the close of plaintiff's case, on motion of defendant the court instructed the jury to find a verdict in the latter's favor, which was done. From a judgment rendered thereon, plaintiff appeals.—*Affirmed.*

C. E. Hunn for appellant.

W. G. Harvison for appellee.

WATERMAN, J.—Exceptions are taken to certain rulings of the court sustaining objections to questions asked by plaintiff of the witness King; but the witness
1 answered in each instance, and his answers were allowed to stand, so no prejudice could have resulted.

Plaintiff was employed by defendant to find a purchaser for a stock of goods. He found one King, who seemed likely to buy, if real estate he had were accepted in payment.

To bring the matter to a conclusion, defendant
2 made the following written proposition (the real estate referred to being that owned by King): "Will accept the 320 acres, 3½ miles south of Scotland, at \$22.50 per acre, provided the description is a guaranteed one from Mr. King. Said land to be accepted subject to a \$2,000 mortgage, at 8 per cent interest, with interest and taxes paid to date. Abstract and title to be clear from all cloud on title, and showing no incumbrance other than the \$2,000 mentioned above; Mr. King or owner to pay difference of \$800.00 in cash or good notes. Party to accept deal by wire, subject to approval, and to reach here not later than Tuesday, March 10, 1897. [Signed] J. L. Ives." King came to

Des Moines, where defendant then was, and signified that he would accept the offer. His real estate was incumbered by a second mortgage for six hundred and seventy-five dollars, and there was interest due on the two thousand dollar mortgage, and also taxes unpaid. He offered to give a note for the eight hundred dollars bonus which he was to pay, and we think the evidence shows it to have been a good note. The jury would have been warranted, also, in finding that he was able and willing to pay off the second mortgage, the accrued interest on the two thousand dollars, and the taxes due; for we think, under the offer, it was King's option to say whether he would pay the bonus in a note instead of cash. Had this been accepted by defendant, King would have been left with cash sufficient to put the title in the required condition. In one respect, however, the offer of defendant was not complied with. No abstract was furnished or offered, showing title in King. This was a condition of defendant's offer. To have bound him, his proposition should have been accepted strictly according to its terms. *Gilbert v. Baxter*, 71 Iowa, 327. We grant that plaintiff's commission was earned as soon as he found a purchaser able and willing to buy on the terms proposed. *Boland v. Kistle*, 92 Iowa, 369; *Hanna v. Collins*, 69 Iowa, 51. The fact that his principal refused to sell to the customer produced will not defeat his right. *Ford v. Easley*, 88 Iowa, 603. But, if it appears the sale fell through because of some fault of the intended purchaser, no commission is earned, for then the agent has failed to find a buyer able and willing to accede to the proposed terms. As we have said, no abstract of title was produced or offered, and it was a part of defendant's proposition that one should be furnished. He had a right to insist that his proposition was not accepted until this was done. For this reason, we think the verdict was properly directed, and the judgment will be AFFIRMED.

NATIONAL CASH REGISTER COMPANY, Appellant, v. C. H.
SCHWAB & CO. AND J. AKERS.

111	605
6127	713
111	605
140	685

Conditional Sale: VALIDITY: *Seller retaining title by recorded bill of sale.* Under Code 1873, section 1922, declaring that no conditional sale shall be valid against a creditor of the buyer in actual possession thereunder, without notice, unless in writing, executed by the seller, and acknowledged and recorded the same as a chattel mortgage, a bill of sale wherein title to the goods was retained by the seller till full payment, executed by the seller, and acknowledged and recorded, was sufficient to protect the seller's right to such goods against a subsequent creditor of the buyer, though such instrument was not executed by the *buyer*.

Appeal from Linn District Court.—HON. H. M. REMLEY,
Judge.

WEDNESDAY, MAY 23, 1900.

THIS is an action in replevin. It was tried without a jury, and comes here on a certificate of the trial judge. The facts will be found in the opinion. From a judgment in favor of defendants, plaintiff appeals.—*Reversed*.

John M. Redmond for appellant.

No appearance for appellee.

WATERMAN, J.—Plaintiff sold to one W. W. Burns, on partial credit, a machine called a "cash register." It executed at the time a bill of sale, one of the provisions of which was that it should retain title until full payment was made. This instrument was duly acknowledged and recorded in Linn county. Thereafter, the defendants Schwab & Co., having a judgment against Burns, and without actual notice of plaintiff's rights, procured an execution thereon, which

was levied upon this machine by Akers, who is a constable. The present action in replevin was then brought. Section 1922, Code 1873, under which this controversy arose, is as follows: "No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages." The question we have to determine is, who must execute the written instrument in order that the right referred to in this section may be saved? Should it have been signed by Burns, or is it enough that it was executed by plaintiff? It may be thought it would be more logical to have the instrument executed by Burns, but this is not enough to warrant us in ignoring the plain terms of the statute. It is the vendor or lessor who must do so, and Burns is not described by either term. In some cases where the first vendee has sold or leased, and his grantee or lessee is asserting rights, the original purchaser or lessor might be included in or described by the terms vendor or lessor; but the statute covers other cases, and in the one at bar, where it is a subsequent creditor who makes claim, the terms of the statute exclude the idea that the first vendee is the person who is to execute the instrument provided for. In our opinion, the statute is so plain and clear as not to be open to construction. The sale shall be valid against any "creditor" (Schwab & Co.) of the "vendee" (Burns) when the same is in writing, executed by the "vendor" (plaintiff). No other construction will harmonize and give effect to the language used. The judgment must be BEVERSED.

HENRY L. B. LANGFORD BROOKE, Appellant, v. MATTHEW KING, Assignee.

Claims Against Estate of Insolvent: IMPROPER FILING: *Res adjudicata*. A judicial finding that a claim against an estate, assigned for the benefit of creditors, is valid precludes the assignees from resisting its payment on the ground that it was not properly filed.

Appeal from Crawford District Court.—HON. S. M. ELWOOD, Judge.

WEDNESDAY, MAY 23, 1900.

ON the tenth day of August, 1893, John H. De Wolf and the Citizens' Bank of Vail made a general assignment for the benefit of their creditors to defendant. On the seventeenth day of that month the assignee first published notice as required by law. November 5th following, plaintiff began an action against the assignee by intervening, as it is styled, in the assignment proceedings, claiming the sum of six thousand three hundred and fourteen dollars, and asking that it be established as a preferred claim. In due time a trial was had in this proceeding, and the district court allowed the amount claimed, with interest, and gave it a preference over the claims of general creditors. From this judgment there was an appeal by the assignee to this court, where the judgment was modified so far as to allow a preference only to two thousand four hundred and eighty dollars of the amount found due. See 104 Iowa, 713. Thereafter the assignee paid to plaintiff the sum of two thousand four hundred and eighty dollars, with interest, being the amount which was given a preference by this court, and reported against the payment or allowance of anything further, because the claim was not

filed within the time fixed by law. To this report plaintiff filed exceptions. These exceptions were overruled, and judgment entered disallowing the balance of the claim. From this judgment the present appeal is taken.—*Reversed*.

Swan, Lawrence & Swan and Shaw & Kuehnle for appellant.

P. E. C. Lally and J. P. Conner for appellee.

WATERMAN, J.—No argument is made on behalf of the assignee. We have no means of knowing the grounds upon which he resists payment of the balance due plaintiff further than as they appear in his report. The only reason there set out is that the claim was not filed with him as required by law.

Whether the commencement of a proceeding such as this would in general amount to the filing of a claim we need not say. Our holding here may well be rested upon other and unquestionable grounds. The judgment of the district court in the original proceeding established two things: (1) That the whole amount sought to be recovered was a valid claim against the assignee; (2) that it was all entitled to a preference. On appeal this court affirmed that judgment, except that it reduced the amount which was ordered preferred. Whether filed in time or not, we have here a judicial finding that the claim is valid against the estate, and that holding is the law of this case. *Robertson v. Stoddard Co.*, 106 Iowa, 414; *Rice v. Grand Lodge*, 103 Iowa, 643. For the reasons given, the judgment must be REVERSED.

A. H. BROWN v. T. F. CARL, Mayor of the Town of Lone Tree, *et al.*, Appellants.

Erection of Waterworks: PROPOSITION SUBMITTED AT ELECTION:
Sufficiency of proposition. Under Code, section 720, providing that no waterworks shall be authorized, established, or erected

by a town unless a majority of the legal electors voting thereon vote in favor of the same, the construction of waterworks by
1 a town is not authorized by a majority vote at a special election upon the question, "Shall the town issue bonds for the purpose of erecting, maintaining, and operating a system of waterworks?"

CONSTRUCTION OF PROPOSITION. The proposition, "Shall the town issue bonds, not to exceed the sum of \$3,500, for the purpose of erecting, maintaining, and operating a system of waterworks?" is misleading, in that it limits the amount to be used for maintaining as well as constructing the waterworks;
2 and its submission to a vote of the people cannot be made the basis of authority for construction of such works.

Appeal from Johnson District Court.—HON. M. J. WADE,
Judge.

WEDNESDAY, MAY 23, 1900.

ACTION in equity by a citizen and taxpayer of the town of Lone Tree against the mayor and members of the town council to restrain the issuance of bonds voted for the purpose of raising money to construct a system of waterworks in said town, on the ground that the voters had not legally authorized the construction of said works. On a hearing, the injunction was granted as prayed. Defendants appeal.—*Affirmed.*

O. A. Byington and Ranck & Bradley for appellants.

Baker & Ball for appellee.

WATERMAN, J.—It is claimed that a majority of the legal votes cast at an election held for that purpose were in favor of the construction of such waterworks, and the issue here arises on the form of the proposition submitted. Code, section 720, in relation to building waterworks by a city or town, provides: "No such works or plants shall be authorized, established, erected, leased or sold or franchise extended or renewed, unless a majority of the legal electors

voting thereon, vote in favor of the same at a general or special election." Section 721 makes further provision in the matter, but nowhere is the form of the question to be submitted precisely stated. It is manifest, however, that this requirement is a limitation upon the power of the municipality. The question submitted and voted upon in this case was: "Shall the town issue bonds, not to exceed the sum of \$3,500, for the purpose of erecting, maintaining, and operating a system of waterworks for said town?" The
1 question to be passed upon, under the statute, was whether the municipality should construct waterworks. It is in the proposition submitted only by implication. There is no reason why the plain question to be passed upon should not have been submitted. This proposition is to issue bonds, and not, in terms, to build the plant. It is argued that the implication is a necessary one, but we are not able to say that enough voters were not misled to effect a change in the result. It is true, the law does not provide for the submission to the voters of the question of issuing bonds, but this fact hardly aids defendants. That was the question submitted, and the voters, knowing the law did not require such action on the part of the council, may have supposed the vote to be advisory only in case the plant was erected. The vote on the building of the works might, as they perhaps supposed, have followed the vote to issue bonds. While the proposition submitted and voted upon provided for the use of the money raised in part for operation of the works, this was but an incident of the real question propounded, which was whether bonds should be issued. We find no case directly involving the issue as to the form of the question to be submitted, but it appears to us that the precise question to be passed upon should be placed in plain terms before the voters.

Another serious defect in the question voted upon is that it fixes the amount of \$3,500 as the limit of the amount

to be used for maintaining as well as constructing the water-works. In *McMillan v. County Judge*, 3 Iowa, 311, 2 it is said: "The law contemplates unity and directness in the question authorized to be submitted, in contradistinction to the uniting of several questions in the same proposition, or the incumbering of any proposition with conditions not required or not permitted by the statute." The maintenance of the waterworks was a condition not required to be submitted. It was in the nature of an inducement to the voter to cast an affirmative ballot; for it stated, in effect, that the town should not be bonded for more than three thousand five hundred dollars, and this sum would be used, not only to pay for construction, but also for maintenance. Stripped of this condition, it is impossible to say whether the majority of electors would have voted in favor of the proposition. It is not a question whether any voter was in fact misled. The validity of an election cannot be made to depend on extrinsic evidence. Is the language of the ballot so plain that there could have been no mistake as to the proposition submitted? We think it should have been, and we are equally clear that it was not. There is no reason for placing anything more on the ballot than the simple question specified in the statute, although something added thereto, if not calculated to mislead, might well be held not to invalidate the election. But here the addition was misleading in its character. In our opinion, the decree rendered by the trial court is correct, and it is AFFIRMED.

T. F. WARD v. W. WALKER, MACE, GARRETT & Co., Defendants, M. A. WALKER, Intervener, AND W. WALKER, Appellants.

111	611
122	44

Landlord's Lien: PROPERTY OF MEMBER OF PARTNERSHIP. Under Code, section 2992, providing that a landlord shall have a lien on all crops grown on the leased premises, and any other personal

- 2 property of the tenant used and kept thereon, individual property of one member of a firm used and kept on the leased premises, is not subject to the landlord's lien for rent due from the firm.

Notice of Appeal: UPON CO-DEFENDANT: *When not required.* Under Code, section 4111, providing that, where one or more of several plaintiffs or defendants appeal, notice thereof shall be served on the rest of the parties to the action, it is not necessary for a defendant appealing from a judgment to serve notice on a co-defendant who made no contest in the trial court, and took no appeal from the judgment rendered therein as such co-defendant has no interest which can be affected by the decision of the appellate court.

Appeal from O'Brien District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, MAY 23, 1900.

ACTION by landlord's attachment to recover rent due under a written lease. M. A. Walker intervened, claiming a lien superior to that of plaintiff under a chattel mortgage. A jury was waived, and trial had to the court. From a judgment in plaintiff's favor, W. Walker and intervener appeal.—*Reversed.*

W. Walker for appellants.

Alger & Ward and *Carr & Parker* for appellee.

WATERMAN, J.—The property in question is a set of books containing abstracts of titles to lands and town lots in O'Brien county. The defendant Warren Walker was the owner of these books on September 8, 1896, and on that day sold them to one Frank F. Mace, and to secure payment of the purchase price he took from Mace a chattel mortgage thereon. This mortgage was given and dated September 8th, but was not recorded until the seventh day of December following. On November 24, 1896, plaintiff, by written instrument, leased certain premises to the firm of Mace, Garrett

& Co., of which it is claimed Frank F. Mace was a member. This lease was for thirteen months, at a rental of fifteen dollars per month. The books of abstracts were used by said firm on the leased premises. But one month's rent was paid, and on August 20, 1897, this action was begun. Plaintiff had no notice of the existence of the mortgage when the lease was executed.

II. We are asked to dismiss the appeal, because the evidence is not properly certified. It is needless to do more than say there is no ground for this claim. A motion is also made to dismiss the appeal because notice thereof
1 was not served on Mace, Garrett & Co. A similar motion, based on the same ground, was made in this case before its submission, and was overruled. Appellant, on the strength of *Denning v. Butcher*, 91 Iowa, 428, claims the ruling on the first motion to be *res judicata*. But, if this were not so, we should have to hold the motion now made without merit. Mace, Garret & Co. made no contest in the trial court. They were content to let the two creditors who appear here fight out the question of priority. Mace, Garret & Co. have, therefore, no interest which can be affected by our decision, and there was no necessity for serving them with notice of appeal under section 4111 of the Code.

III. If we find that Frank F. Mace was a member of the firm of Mace, Garrett & Co., we have, then, this question: Can a writ of landlord's attachment issue against his individual property for a debt of the firm? Un-
2 questionably Frank F. Mace is individually liable for firm debts, but the question is, can a landlord's writ run against any property save that of the tenant? Section 2992 of the Code provides that the lien of the landlord shall be upon "all crops grown on the leased premises, and upon any other personal property of the tenant, which has been used or kept thereon during the term, and not exempt from execution," etc. In *Perry v. Waggoner*, 68 Iowa, 403, a somewhat similar question was presented, and this court

said: "The lien given the landlord for the security of his rent is strictly statutory. It is created by section 2017 of the Code of 1873, which provides that a landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant, which has been used upon the premises during the term. There can be no question as to the extent of the right created by this section. It gives the landlord a lien upon all crops grown upon the demised premises, and upon all other personal property of the tenant used upon them during the term; but this is the extent of his remedy. He has no lien upon the property of third parties, though it may have been used by the tenant upon the demised premises during the term." As was further said in *Merrit v. Fisher*, 19 Iowa, 354: "The lien and the remedy thus given the landlord are purely statutory. It is a species of class legislation in favor of landlords, granting them rights not given to creditors generally. It follows that in availing himself of this special remedy the landlord must take it just as the statute gives it to him. See, also, *Clark v. Haynes*, 57 Iowa, 96. If it be said that Frank F. Mace, though not the tenant named in the lease, was liable for the rent because he was a member of the lessee firm, we should answer that, although this fact would justify ordinary process against him, it will not warrant a landlord's writ, which can run only against the goods of the tenant. The property here belonged to Frank F. Mace. The firm had no interest in it whatever. The fact that plaintiff might have had a writ of ordinary attachment against the individual property of Mace is by no means decisive of the question before us. An ordinary attachment creates a lien; that of a landlord simply enforces one that already exists. We look to the statute to see the extent of the landlord's lien, and beyond what is there given the levy cannot extend. Appellee asserts that intervener concedes the right of plaintiff to a lien on the property of F. F. Mace if

he was a member of the firm. We do not find this to be the fact; on the contrary, it is expressly denied. The judgment must be BEVERSED.

ISABELLE McCLINTIC v. JOHN F. McCLINTIC, Appellant.

Husband and Wife: EARNINGS OF WIFE. A single and a married brother owned adjoining farms, on one of which they lived in the
1 same house, and farmed both places, under a partnership agree-
ment, that the unmarried brother should furnish half of the
family provisions and fuel, and that he should receive his
2 board, washing, ironing, and mending in the family. The
married brother's wife lived in the family, and had no other
occupation than a housewife. After her husband's death she
brought an action against the surviving brother to recover for
the services performed in furnishing such board, washing,
ironing, and mending. *Held*, that the services of the wife be-
longed to the husband, and she could not recover.

RECOVERY BY WIFE: *Elements of the action.* In an action by a wid-
ow to recover of her deceased husband's unmarried brother for
board furnished him while he lived in her husband's family,
on a farm, which the brothers worked together, under an
3 agreement that the unmarried brother should receive his
board and should furnish one-half of the family provisions and
fuel, during which time the wife had no other occupation than
that of a housewife in the family, she must allege and prove
an express agreement by the defendant to pay her therefor,
to which her husband consented.

**Requesting Instruction: WHEN NO WAIVER OF DEFECTS IN PLEADING OR
ADMISSION OF TESTIMONY.** In an action by a widow to recover
of her deceased husband's brother for board and washing fur-
nished such boarder while he lived in her husband's family,
defendant asked an instruction that plaintiff, to recover, must
show that there was a special contract between defendant and
4 plaintiff to pay for such board and washing. *Held*, that the
asking of such instruction, done for the purpose of meeting
prior rulings in taking testimony, did not preclude defendant,
on appeal, from raising the question that plaintiff's petition
failed to allege such contract, or that the court erred in ad-
mitting testimony offered to prove the same.

Evidence: PERSONAL TRANSACTION WITH DECEDENT. Under Code,
section 4604, providing that no party shall be examined as a

111	615
135	239

111	615
140	114
141	509

111	615
143	359

witness in regard to transactions or communications had personally with a deceased person, in an action against the heir at law, next of kin, or assignee of such deceased person, it is competent, in an action by a widow to recover of her deceased husband's unmarried brother for board furnished such brother while he lived in her husband's family on a farm which the brothers worked together, for the defendant to testify on what terms he lived with his brother.

ADMISSIBILITY OF TESTIMONY. In an action by a widow to recover of her deceased husband's unmarried brother for board and washing furnished such brother while he lived in her husband's family, the defendant should have been permitted to introduced evidence that he furnished half the family provisions and fuel under an agreement with her husband, as such evidence would go to the value of the board.

Appeal from Jefferson District Court.—HON. M. A. ROBERTS, Judge.

WEDNESDAY, MAY 23, 1900.

THE plaintiff's petition, as originally filed, is as follows: "Your petitioner, Isabelle McClintic, claims of the defendant, John F. McClintic, the sum of forty-seven hundred dollars, as justly due her on account, a copy of which is hereto attached and made a part of this petition. Said account has been running continuously, and is due and unpaid, and entitled to no credits or offsets, and is her property. Also as damages as follows: To trespass upon her in her homestead, abuse and ill treatment, and alienating the affections of her husband, and causing him to turn against her, and abuse and ill treat her and the children, causing their separation, \$2,000. She asks judgment on said claims for the sum of \$4,700, with costs of suit."

Copy of account attached to petition:

"John F. McClintic to Isabelle McClintic, Dr.

	To board continuously, week by week, since	
1	April 1, 1878, 900 weeks, at \$2.00 per	
	week	\$1,800 00

To washing, ironing, mending, and other personal services, continuously, week by week, since April 1, 1878, 900 weeks, at \$1.00 per week.....	900 00
To damages for injury to her in alienating and turning her husband against her and personal abuse	2,000 00
Total	\$4,700 00

“December 15, 1896.

“[Signed]

Isabelle McClintic.”

Amendments were made as to the claim for trespass and for alienating the affections of her husband, but none as to boarding, washing, ironing, mending, and other services. The jury found for the plaintiff on her claim for boarding, washing, ironing, and mending only, and as the questions presented arise solely upon these claims the others require no further notice.

To the claims for boarding, washing, ironing, mending, and other personal services, the defendant answered, in substance, as follows: He denies that the plaintiff furnished him any boarding, and denies that he is indebted to her for washing, ironing, mending or other personal services. He alleges that from April 1, 1878, to December 15, 1896, the plaintiff was the wife of defendant's brother Alex. W. McClintic; that she resided with him on his farm, doing the housework for her husband; that she had no other or separate business; was not engaged in keeping boarders, or in doing washing, ironing, and mending; that defendant was, and still is unmarried; that he owned a farm adjoining that of his brother, and that about February 1, 1878, he and his brother entered into an agreement to engage in farming, raising, buying, and selling stock and grain, and to use both of said farms for such purposes, as equal partners, and defendant to live in the family of his brother, and to have his boarding, washing, ironing, and mending done in the family, in consideration that defendant should furnish one-half of all the family provisions and fuel; that said part-

nership continued until dissolved by the death of said brother, about June 15, 1897. He alleges that he has fully paid and satisfied his brother for all such boarding, washing, ironing, and mending. The jury found in favor of the plaintiff in the sum of two thousand dollars for boarding, washing, ironing, and mending. Judgment was rendered on the verdict. Defendant appeals.—*Reversed*.

Raney & Simmons, I. D. Jones, and Rollin J. Wilson for appellant.

Legget & McKemey and McCoid & Tomlinson for appellee.

GIVEN, J.—I. There is no dispute but that the defendant made his home with his brother and the plaintiff during the years mentioned, and that he received the boarding, washing, ironing, and mending charged for; the work being done by the plaintiff, aided to some extent by
2 her children as they grew to a helpful age. There is no question but that during those years the plaintiff's sole occupation was that of a housewife in taking care of the home of her husband and family. She had no other or separate occupation, and was not engaged in keeping boarders, or in washing, ironing, and mending, as a separate occupation, nor did she furnish the supplies for the table at which the defendant boarded. The law is undisputed that the husband is entitled to the services and earnings of his wife when she is not engaged in business on her own account.

Va Doren v. Marden, 48 Iowa, 186; *Lyle v. Gray*,
3 47 Iowa, 153. Primarily, plaintiff's husband was entitled to this compensation, and it is only upon an agreement between plaintiff and the defendant, assented to by her husband, that she is entitled to recover this compensation.

The court, in taking the evidence and in submitting the case to the jury, proceeded upon the theory that if there was

an agreement, express or implied, that the defendant should pay the plaintiff, she is entitled to recover, and of this the defendant complains. There is no allegation of any agreement, express or implied, as to this claim in the petition; it is a claim on account only.

Plaintiff cites cases to the effect that items due on contract may be recovered in an action on account without alleging the contract, but that the rule will not apply if the recovery can only be had upon contract. The petition upon its face was sufficient if it were not for the facts alleged in the answer and appearing on the trial as to the circumstances in which the boarding, etc., were furnished. Therefore a motion for more specific statement would not lie against the petition.

The compensation being primarily due to the husband, the law will not imply an agreement to pay the wife, as would be the case between the defendant and the husband. Therefore the wife can only recover upon an express contract to pay her. A furnishes boarding and services to B. without an express contract. The law implies an agreement on the part of B. to pay to A., but does not imply an agreement to pay to C. As we view it, the plaintiff is only entitled to recover this compensation on proving an express agreement

upon the part of the defendant to make payment to
4 her. Plaintiff insists that as defendant asked an instruction to the effect that the plaintiff could not recover unless the defendant made a special contract, he should not now be heard to complain that the case was tried upon the theory of an existing contract. The instructions asked were adapted to the prior rulings of the court in taking testimony, and were not such as to preclude the defendant from making the questions he now does against the rulings on evidence and in the instructions given. As the plaintiff can only recover upon alleging and showing an express agreement that this compensation was to be paid to her, and as no such allegation was made, we think the court erred in submitting the question of contract to the jury. See *Koehler v. Wilson*, 40 Iowa, 183; *Clark v. Reiniger*, 66 Iowa, 507.

II. The defendant was called as a witness in his own behalf, and, having testified that he lived in his brother's family, was asked, "On what terms did you live there?"

To this the plaintiff objected as "immaterial, irrelevant, and because, under Code, section 4604, the
5 witness is disqualified," which objection was sustained. The purpose of this inquiry was to show the co-partnership agreement as alleged in the defendant's answer. Said section 4604 is as follows: "No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any such party or person shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person or the assignee or guardian of such insane person or lunatic." Plaintiff fails to point out wherein this section is applicable to this case. The offered testimony was not in an action nor against either of the classes of persons contemplated in said section. It is by the plaintiff in her own personal right against the defendant upon his individual liability. As said in argument: "The rights of neither depend on their legal relationship to Alexander W. McClintic." Plaintiff's contention is "that if the defendant agreed to pay the plaintiff it is immaterial whether he had a contract with her husband to pay him for the same services." Let this be conceded, yet, the contention being whether defendant had agreed to pay the plaintiff, evidence that he had agreed to pay her husband was certainly admissible upon this question. The argument assumes that defendant had agreed to pay the plaintiff, but, that being in issue, the offered evidence has a material bearing on that issue. It was for the jury to say whether there was an agree-

ment of co-partnership as alleged in the answer, and whether with such an agreement the defendant would also have agreed to pay the plaintiff. The value of what is claimed was also in issue. Therefore, if the defendant furnished half, or any part, of the provisions and fuel used in the family, he should have been permitted to show that fact; for, even if he was obligated to pay the plaintiff, he should not pay her as much as if he had not furnished anything in the way of fuel and provisions. The offered evidence as to the settlement between the deceased and his brother should have been admitted as having a like bearing upon the issue as to whether defendant had agreed to pay the plaintiff. As for the reasons stated the judgment against defendant is reversed, and as the other errors assigned and argued are not likely to arise upon a new trial, they need not be considered.—REVERSED.

STATE OF IOWA v. DAVID R. WRIGHT, Appellant.

Appealable Orders: REFUSAL TO ALLOW TRANSCRIPT AT EXPENSE OF COUNTY. Since, Code, section 254, providing that if defendant in a criminal case has appealed from the judgment against him, and shall satisfy the court from which the appeal is taken that he is unable to pay for the transcript, the court may order the same at the expense of the county, is in the nature of a provisional remedy, and not a part of the criminal case itself, it is within section 4101, authorizing an appeal from an order affecting a provisional remedy, and an appeal will lie from an order refusing a transcript in a criminal case, at the expense of the county.

DEEMER and LADD, JJ., dissenting.

REVIEW ON APPEAL. The denial by a court of a transcript at the expense of the county, the furnishing of which transcript is authorized by Code, section 254, in cases where a defendant is unable to pay for one, is not conclusive, and the findings leading to such denial may be reviewed on appeal.

SAME: Duty of relatives. Where defendant in a criminal case has no means, and his relatives refuse to furnish him money to pay

111	621
131	676

111	621
133	32
133	33

111	621
136	447

111	621
137	92
137	95

for a transcript necessary for appeal, it is error for the trial
3 court to deny his application for transcript at the expense of
the county, as authorized by Code, section 254, since there is
no law requiring relatives to assist in such a case, where de-
fendant is an adult.

Appeal from Appanoose District Court.—HON. M. A. ROB-
ERTS, Judge.

WEDNESDAY, MAY 23, 1900.

THE defendant was convicted of the crime of man-
slaughter. After final judgment, and after an appeal had
been perfected therefrom, he made application to have the
evidence in the case transcribed at the expense of the county,
which was denied, and he appeals from that order.—*Re-
versed.*

C. F. Howell for appellant.

Milton Remley, Attorney General, for the State.

SHERWIN, J.—This is an appeal from an order refusing
a transcript in this case at the expense of the county. The
state contends that an appeal will not lie from the order.

Section 254 of the Code, under which the applica-
1 tion was made, does not provide for an appeal; nor
can it be successfully urged that an appeal will lie
under section 5448, which provides for appeals in criminal
cases, for that section expressly states that an appeal can
only be taken from the final judgment. This court has hereto-
fore entertained appeals from orders under the statute
in question, but without any suggestion as to its want of
jurisdiction so to do. *State v. Waddle*, 94 Iowa, 748; *State
v. Robbins*, 106 Iowa, 688. The right of appeal is a purely
statutory one, and it follows as a matter of course that, if
the statute does not give this right in the case before us, it
does not exist. So much of section 254 of the Code as relates
to the matter in controversy is as follows: "If the defendant

in a criminal case has appealed from judgment against him, and shall satisfy a judge or a court from which the appeal is taken that he is unable to pay for the transcript, such judge may order the same at the expense of the county." This procedure after final judgment in a criminal case, whereby it is sought to impose a financial burden upon the county for the purpose of assisting the defendant in presenting his case to this court, may be said to be in the nature of a provisional remedy; that is, one which provides for his present needs or for a present exigency. *Blair v. Blair*, 74 Iowa, 311. It is not, strictly speaking, a part of the criminal case itself, but an after provision, made by the legislature for the full protection of the accused upon appeal to this court. We therefore think it falls within section 4101 of the Code, relating to civil procedure, and that an appeal will lie from the order. This view finds support in 2 *State v. Jones*, 64 Iowa, 358. The trial judge, in denying the application for a transcript, stated that he did so because he was satisfied that defendant could procure means to pay for the same.

It is contended on the part of the state that this finding of the trial court is conclusive under the statute, and that this court cannot review the evidence upon which the finding is based. Such cannot be held to have been the intention of the legislature. Such a rule would invest the court with the most arbitrary power, and, no matter how flagrant its abuse thereof, no redress could be had upon appeal. The intent of the statute is to clothe the judge with power to grant or refuse the request as shall appear to him right under the proof submitted, and his finding thereon is subject to review here. If this court is satisfied that there has been no abuse of the discretion lodged in him, his action will be approved. But, if it shall appear there was no foundation for the finding, then it is the duty of this court to correct the error.

The appellant filed affidavits showing conclusively that he was himself entirely destitute of property or means of any kind or description, and stating that he had no relatives who were able to render him further assistance. In addition
3 to this, his affidavits showed that his relatives absolutely refused to furnish him more money for the purpose of appealing his case, and that he was unable to raise it from any source. To overcome this showing, the state produced affidavits setting forth the fact that the defendant was able to procure bail, and that some of his relatives owned property from which they might raise the necessary money; but in every instance those relatives swore that they were in debt, and that to aid the defendant would require great sacrifice on their part. While a moral obligation may require relatives to assist one another in such cases, we know of no legal rule requiring it, where, as in this case, the defendant is an adult. If, as intimated by the state in resisting the application, the judge had facts bearing upon the question specially within his own knowledge, they ought in some way to have been made a part of the record for review by this court. We reach the conclusion that the trial court made a mistake in not granting the order upon the showing made, and the case is reversed and remanded, with direction to grant the order.
—REVERSED.

DEEMER, J.—(dissenting). Regretting that I cannot agree with the majority, for I believe that the legislature ought to provide for an appeal from such a ruling as is here involved, I am nevertheless constrained to file this dissent from what I think is a plainly erroneous construction of the statute. The majority correctly say that the right of appeal is purely statutory, and that if the statute does not confer the right it does not exist. I would only add this general principle, that, when a statute does give the right of appeal from certain orders in a criminal case, appeals from all other orders are by necessary implication excluded. This is simply an application of the maxim, "*Expressio unius est*

exclusio alterius." Now, Code, section 5448, provides that "the mode of reviewing in the supreme court any judgment, action or decision of the district court in a criminal case is by appeal. An appeal can only be taken from the final judgment and within one year thereafter. Either the defendant or state may appeal." It will be noticed that the statute covers any judgment, action, or decision in a criminal case, and then provides that an appeal can only be taken from the final judgment. That the order in question was an action or decision in a criminal case can hardly be doubted. To avoid the effect of this conclusion, the majority say that the procedure was not a part of the criminal case, but a provisional order, from which an appeal will lie, because of the section of the statute relating to appeals in civil cases. This, to my mind, is the fundamental error of the opinion. It is an order or decision in a criminal case, and the section of the statute under which the order was made (section 254) gives no right of appeal. *Blair v. Blair*, 74 Iowa, 311, is a civil case, and the provisional order there made was appealable by the express terms of the statute. See Code, section 4101. *State v. Jones*, 64 Iowa, 358, simply holds that a petition for rehearing may be filed in a criminal case after an opinion has been filed in this court. The decision was based on sections 3201, 3202, Code 1873, which were general in terms, and related to procedure in this court. Nothing was said regarding petitions for rehearing in the sections of the statutes relating to criminal appeals, and the general statutes relating to practice in this court were held applicable to criminal appeals. The case does not, in my judgment, give any support to the conclusions of the majority. Here we have a statute giving the right of appeal from judgments in criminal cases, of necessity, excluding the right in all other matters. For obvious reasons, the statutes relating to the right of appeal in civil cases cannot apply. *State v. Waddle* and *State v. Robbins*, cited by the majority,

are not in point. The *Waddle Case* arose under the Code of 1873, and the question was not raised in the *Robbins Case*. Code 1873, sections 4520, 4522, expressly gave the right of appeal from any action or decision in a criminal case, but provided that no appeal could be taken until *after judgment*. Under these statutes, it was expressly held that the sections of the Code relating to criminal appeals did not apply, and that no appeal could be taken in criminal cases from rulings on a demurrer. *State v. Swearengen*, 43 Iowa, 336; *State v. Hoffman*, 67 Iowa, 281. In the former case it is said: "It is expressly provided an appeal may be taken from an intermediate order or decision in a civil action, but, there being no such provision as to a criminal action, an appeal therein can only be taken from the judgment which is the final adjudication." The appeal in the instant case is not from the final judgment, but is from an action or decision in a criminal case based on the statute providing for the allowance of a transcript at the expense of the county, from which no right of appeal is either recognized or provided. To sustain the conclusion reached by the majority, the preposition "from" should be construed in its primary sense, as relating to time, and not in its secondary, as relating to cause or instrumentality. That it is not based on this reasoning is evidence that it cannot be. I am ready to agree that the word, ordinarily, relates to time, but it may also be used in its secondary sense. That it relates to a cause or instrumentality is, it seems to me, clear from the context. The time within which the appeal may be taken is fixed by the last clause of the sentence. The first part relates to subject-matter and the second to time. Statutes often use the word in connection with robbery, as robbery "from" the person. When so used, it does not mean after. It has no reference to time, when so used. The change in the word from "after" to "from" in the new Code is significant. In the Code of 1873, "after" referred to time; in the new Code, "from" refers to subject-matter.

It may be that, on appeal from a final judgment, intermediate orders may be considered on appeal. Indeed, I think we ought to so hold. But, as already suggested, this is not an appeal from a final judgment. The appeal is from the decision of the district court in a criminal case, independent of the main appeal from the final judgment. And as the appeal can only be taken from the judgment there is nothing to consider, for the statute under which the order was made does not provide for an appeal. As I view it, the majority are unduly impressed with the idea that an appeal should be allowed from such order, and that to deny it would jeopardize the rights of one accused of crime. While there is some potency in the thought that an appeal might well be provided in such cases, it furnishes no reason for allowing it, when the legislature for some reason saw fit to deny the right of appeal from an order refusing the ordering of a transcript at the expense of the county. The whole matter seems to be left to the sound discretion of the trial court, and we have no right to assume that this discretion will be illegally or unjustly abused. I would dismiss the appeal.

LADD, J., concurs in this dissent.

W. S. BAIRD V. THE OMAHA & COUNCIL BLUFFS RAILWAY
& BRIDGE COMPANY OF NEBRASKA AND THE OMAHA &
COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY OF
IOWA, Appellants.

111	627
114	635
111	627
1134	678

Statute of Limitation: ACCRUAL OF ACTION FOR MISTAKE. Under Code, section 3448, providing that actions for relief because of mistake shall not accrue until the mistake is discovered, where a tax voted in aid of a resident bridge company is by it assigned
2 to a foreign company, which cannot legally receive such aid without the tax payer's knowledge, who pays the tax believing the resident company is to receive it, an action for its recovery because of such mistake does not accrue until a discovery of the mistake.

Time of Appeal: COMMISSIONERS' REPORT: *Final judgment.* Where, in an action involving a money demand, a finding is made for plaintiff, and commissioners are appointed to ascertain the
1 amount due, the time within which appeal may be taken will be computed from the date of the commissioners' report; the judgment not being final until such report is received.

Appeal from Council Bluffs Superior Court.—HON. E. E. AYLESWORTH, Judge.

WEDNESDAY, MAY 23, 1900.

PLAINTIFF, as assignee of the claims of a number of taxpayers, seeks to recover the amounts paid by them to aid in the construction of a bridge over the Missouri river between Council Bluffs, Iowa, and Omaha, Neb. He had judgment in the trial court, and defendants bring the case here on appeal.—*Affirmed.*

Wright & Baldwin for appellants.

W. S. Baird for appellee.

WATERMAN, J.—In the case of Smith against these same defendants (97 Iowa, 545), which was an action by an assignee of a part of the tax in question to recover the same, we held the plaintiff had a right of action, and affirmed a judgment in his favor for the amount claimed. The ruling in that case is not questioned here. The only defense interposed is the statute of limitations.

II. Before taking up the case on its merits, we have to dispose of a claim made by appellee that the appeal was not taken in time. On April 1, 1898, the trial court entered
a finding that plaintiff was entitled to recover, and
1 appointed commissioners to examine and ascertain the amount due. The commissioners reported the amount on July 20, 1898. The following proceedings were then had: "And now at the same time plaintiff appears, and in open court moves for judgment on compliance with the

findings of the court as made and entered April 1, 1898," etc. Judgment was rendered for the amount so reported. On October 8th following, notice of appeal was served. Plaintiff maintains that the entry of April 1, 1898, was the final judgment, and the appeal should have been taken within six months thereafter. In support of this position, a number of equity cases are cited, in which some minor matters were reserved for consideration after a decree on the merits. But this is a law action, in which nothing but a claim for money was involved. There could be no final disposition of the case until the amount was ascertained and fixed. *Giddings v. Giddings*, 70 Iowa, 486; *Roane v. Hamilton*, 101 Iowa, 250, and cases cited. The appeal was timely.

III. A reference to the case of Smith against these defendants, to which we have referred, will show that the ground upon which we held plaintiff there entitled to recover was that aid by public taxation could not be given a foreign corporation formed for the construction of a bridge, and that in this instance the Nebraska company received the taxes collected. We need not go more into detail.

2 Plaintiff's cause of action is clearly barred, unless saved by the provisions of section 2530, Code 1873, being section 3448 of the present Code, which is as follows: "In actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake, or trespass complained of, shall have been discovered by the party aggrieved." It is admitted that the contract between the Iowa and Nebraska companies, by which the former assigned to the latter all right to the taxes in question, and transferred to it all its rights for a term of ninety-nine years, under the city ordinance, which authorized the construction of the railway in the streets of Council Bluffs, and under the act of congress authorizing the building of the bridge, was not made public until December 16, 1891; that it was

not recorded or filed in the office of the secretary of state until January 10, 1894; and that neither plaintiff nor any of his assignors knew of the existence of said contract until December 16, 1891. This action was begun August 20, 1896. Plaintiff claims these taxes were paid under a mistake which was not discovered until December 16, 1891, when the fact first became known that the Nebraska corporation was to receive them. The fraud referred to in section 2530 is such as was originally cognizable in equity. *Cowin v. Toole*, 31 Iowa, 513. But the matter of mistake mentioned is not so limited. *McGinnis v. Hunt*, 47 Iowa, 668; *Higgins v. Mendenhall*, 42 Iowa, 675. The fact that the holding in this last case was reversed when the action came a second time to this court strengthens, rather than weakens, the conclusion we have announced, for the change of opinion is based solely on the fact that the word "mistake" does not appear in the statute there construed. See *Higgins v. Mendenhall*, 51 Iowa, 135. It is true, perhaps, the mistake referred to must be something in the nature of a fraud; that is, the party complained of must have been guilty of some breach of faith in concealing the true state of facts. *Carrier v. Railway Co.*, 79 Iowa, 80. But the facts here as to such concealment are quite as strong as in the *Carrier Case*, which we held to be within the terms of the section under consideration. This tax was voted and paid under the supposition that the Iowa company—the one legally authorized to take—would receive it. The fact that the latter had parted with all right to it was not made known until long after payment had been made. Defendants rely strongly upon the cases of *Beecher v. Clay County*, 52 Iowa, 140, and *Lonsdale v. Carroll County*, 105 Iowa, 452. In both of these instances the taxes were illegally exacted. Nothing was concealed from plaintiffs. In the case at bar the taxes were apparently legally exacted. Payment for the benefit of the Iowa company could have been en-

forced. The wrong here was in the payment by the county treasurer to a person not entitled, the proper beneficiary having disabled itself from claiming or recovering the same. In *Shreves v. Leonard*, 56 Iowa, 74, the court lays special stress on the fact that there was no fraudulent concealment; that is, no affirmative act was done by defendant which misled the plaintiff. Upon these grounds alone is that case distinguished from *Township v. French*, 40 Iowa, 601, in which it was held that a fraudulent concealment of the cause of action would prevent the running of the statute until the right of action was discovered. See, further, as supporting our holding, *Manatt v. Starr*, 72 Iowa, 677. Our conclusion is that the cause of action was not barred, and, as that is the only issue argued here, the judgment of the trial court will be AFFIRMED.

DESSIE D. ELLIS, Appellant, v. MARGERY A. SOPER.

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127 876

Guardian and Ward: RELEASE OF GUARDIAN: *When not conclusive.*

- 3 A ward is not concluded by a release acknowledging final and satisfactory settlement with the guardian, where it is given
- 4 without any accounting or settlement in fact, on the mistaken assurance of the guardian that nothing is due, though no fraud or undue influence is practiced in obtaining it.

ORDER OF DISCHARGE UPON RELEASE: *When not adjudication.* An order discharging a guardian pursuant to a release acknowledging final settlement, given without any settlement in fact,

- 5 edging final settlement, given without any settlement in fact, on the mistaken assurance of the guardian that nothing was due, is not an adjudication on an accounting, and hence is not a bar to an action by the ward, for an accounting.

FINAL REPORT. A guardian's final accounting should cover the entire period of guardianship, where the intermediate reports filed are incomplete.

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SUPPORT OF WARDS BY GUARDIAN'S MOTHER: *Equitable allowance for in absence of order of allowance.* In the absence of an order allowing a widow who is guardian of her children's estate to use the same for their support, a court of equity, on final accounting, will allow her credit for past support, where it is

shown that her own estate was insufficient to support them properly.

RULE APPLIED. A widow having an estate worth \$11,500 and an annual income of \$1,100 for the support of herself and children, for whom she is guardian, should be allowed only the income of their estate towards their support and education, when the estate of each is only \$1,800, since she is primarily liable for their support during minority.

Pleadings: ALLEGATIONS IN REPLY. Allegations setting up a new cause of action or matters already in issue are not permissible in a reply.

DEEMER, J., concurring specially.

Appeal from Jones District Court.—HON. WILLIAM G. THOMPSON, Judge.

THURSDAY, MAY 24, 1900.

PLAINTIFF brings this action in equity against the defendant, formerly her guardian, to set aside an order in probate approving the final report of said guardian, and discharging her, and for an accounting and judgment in the sum of one thousand eight hundred dollars. Plaintiff alleges as grounds for such relief that there is one thousand eight hundred dollars due to her; that her receipt to and release of said guardian upon which said order was based was obtained from plaintiff by fraud, deceit, and undue influence. The defendant answered, in effect denying that there is anything due to plaintiff; alleging a complete settlement with plaintiff, after she became of age by marriage; that said release was given upon such settlement, and denying said allegations of fraud. The defendant sets up a counterclaim, and asks judgment thereon, but the record does not support this demand, and, as the lower court found against her thereon, and she has not appealed, the counterclaim requires no further notice. The plaintiff, in reply, alleged that her guardian failed to protect her interest in the division of the land; that she never obtained

any order of the court authorizing her to lease plaintiff's land; that she allowed the land to run down, and converted the rents thereof to her own use. These allegations were stricken out on motion as setting up a new cause of action for negligence or malfeasance. A further allegation was made in the reply, of matters already in issue, which will be hereafter considered. In the reply the plaintiff, for want of knowledge or information, denied defendant's allegation as to the amount of taxes paid. Upon these issues decree was rendered dismissing the plaintiff's petition, from which she appeals.—*Reversed*.

C. M. Brown and J. W. Doxsee for appellant.

E. B. Soper and Ellison, Ercanbrack & Lawrence for appellee.

GIVEN, J.—I. 'There was no error in sustaining the defendant's motion to strike from the reply. The first paragraph stricken presents a new cause of action, and
2 this is not permissible in a reply. The second presents issues already joined, issues involved in the accounting asked, and therefore was properly stricken.

II. The facts necessary to be noticed are, in substance, these: George Soper died intestate on the twenty-eighth day of October, 1886, leaving the defendant, his widow, and
3 their thirteen children, of whom the plaintiff is one, surviving him. Five of said children (including the plaintiff) were then minors, plaintiff being seven years old, and for these five children the defendant was appointed guardian. On distribution of the personal estate there was paid to the defendant, as guardian of the plaintiff, four hundred and sixty-nine dollars and eighty-eight cents, and on partition of the real estate there was set off to the plaintiff fifty-two acres of land valued at one thousand three hundred and fifteen dollars. There was set off to the defendant as

widow a farm valued at seven thousand two hundred and thirty-three dollars, and personal property, including her temporary allowance and exempt property, of the value of four thousand four hundred and thirty dollars and ninety-eight cents. The plaintiff and said other minor children continued to reside with and to be supported by their mother from the time of their father's death until they became of age by marriage or lapse of time. Plaintiff married one John W. Ellis in 1897, when nearly seventeen years of age. The defendant, with her children, resided on the farm set apart to her until a few years prior to 1897, when she removed to town for the purpose of securing better school facilities for the children. The plaintiff was kept in school about nine months of each year, and received instruction in music, the expenses of which the defendant paid. On the thirty-first day of August, 1889, the defendant filed a report charging herself with rent of plaintiff's land, and interest thereon, taking credit for the taxes of 1887-88, a small amount in attorney's fees, and showing balance due the plaintiff at that time of six hundred and ninety-one dollars and twenty-seven cents. On the twenty-fifth day of March, 1897, after the marriage of the plaintiff, the defendant filed a final report showing that plaintiff had become of age by marriage on the nineteenth day of February, 1897, and stating that since then defendant had a final and complete settlement with her, as shown by the following voucher: "I, the undersigned, Dessie D. Ellis, nee Soper, hereby acknowledge that I became of lawful age on the 28th day of January, 1897, by marriage with Jno. W. Ellis, and I was 17 years of age on February 19th, 1897, and that I examined the report of my guardian, Margery A. Soper, filed in this court, as her first report, and on this 23d day of March, 1897, after being made acquainted with the business pertaining to my guardian's management during my minority, have made a full, final and satisfactory settlement with my said guardian. And

I also waive notice on me of the hearing of the final report, and I ask that the same be approved, and she be discharged and released from her bonds, so far as I am concerned. Dated March 23d, 1897. Dessie D. Soper Ellis." No statement of account accompanied this report, but by virtue of said release the defendant was discharged as guardian.

III. We first inquire whether the plaintiff should be concluded by said receipt and release of March 23, 1897. Appellant cites many authorities to show that in receiving
4 that release the defendant is held to the exercise of the utmost good faith. This rule is undisputed, and, in view of the facts of this case, should be applied in all its force. We are satisfied that in giving and receiving that release both parties acted upon the assumption that the plaintiff's estate had been consumed in her support, and that no fraud was intended, nor deceit or undue influence practiced, by the defendant in obtaining that voucher. If it be true that the plaintiff had not received all that was due to her, but acted on the mistaken assurances of her mother that she had been fully paid when she gave that release, then the release operated as a fraud upon her, and she is entitled to an accounting. The defendant never did render a full account of this guardianship, and, while there was some talk of settlement, there was in fact no accounting to or settlement with the plaintiff when this release was taken. It was taken upon a mere guess as to the true state of the account, and therefore we conclude that the plaintiff is en-
5 titled in equity to an accounting. It is insisted by defendant that the order discharging her was an adjudication, and therefore she cannot be held to an accounting. It was not an adjudication upon an accounting, but upon the release alone, and, if that release is fraudulent, the order does not prevent the court of equity from ascertaining the true state of the account between these parties. Plaintiff insists that in this accounting the balance

of six hundred and ninety-one dollars and twenty-seven cents, as shown by the first order, should be taken
6 as the basis of a further accounting, while defendant now presents her account covering the entire period of her guardianship. That first report was evidently incomplete. It was never approved nor disapproved. Therefore we conclude that an accounting should now be made covering the entire period. The defendant, in her answer, states the account as follows: "To maintenance of plaintiff by defendant for ten years, at \$1.50 per week, \$780.00; to clothing, music lessons, school books, etc., for the years 1887, 1888, and 1899, at \$35 per year, \$105.00; to taxes paid on the real property belonging to plaintiff for the years 1887 to '96, inclusive, \$635.76; to cash expended for or paid over to the plaintiff at her request, as per Exhibit B hereof, \$22.89,—making the total amount of the charges of this defendant against the plaintiff the sum of \$1,682.69. That against the same the plaintiff should be credited with the following: By rental of real property for ten years at the rate of \$85.00 per year, \$850.00; by cash from administrator of estate of George Soper, as per inventory, \$469.88,—making the total amount for which this plaintiff should be credited, \$1,319.88." The credit of twenty-two dollars and eighty-nine cents is for cash and clothing given to the plaintiff after she became of age by marriage, and is not proper to be considered in this accounting.

IV. There is no dispute but that defendant furnished to plaintiff and paid for all items charged in her account, and that the amounts charged are reasonable. The plaintiff assigns two reasons why defendant should not be credited therewith, namely: *First*, that, being the mother of the plaintiff, the defendant was legally bound to support her during minority, and that without an order or court so authorizing she will not be permitted to encroach upon the estate of the ward for her support. Schouler, in his work on Do-

mestic relations (5th ed. A. D. 1895), in the chapter treating of duties of parents, says: "Sec. 239. The mother, after the death of the father, remains the head of the family. * * * And since the tendency of the day is to give the mother a more equal share in the parental rights, it follows that she should assume more of the parental burdens. It is nevertheless clear that the courts show special favor to the mother, as they should; and, if a child has property and means of its own, they will rather, in any case, charge the expenses of its education and maintenance upon such property than force her to contribute." A court of chan-

7 cery will not readily make the support and education of infant children a charge upon the property of their widowed mother while their own means are ample. "Sec. 240. Courts of chancery, following this well-known principle, largely restrict a child's maintenance to the income of his property; but where the property is small, and the income insufficient for his support, the court will sometimes allow the capital to be broken, though rarely for the purpose of the child's past maintenance, when his future education and support will be left thereby unprovided for." In 17 Am. & Eng. Enc. Law, under the title "Parent and Child," on page 358, we find in regard to the duty of parents, as regards the maintenance of their children, the following: "The principle is clearly established that a father must maintain and educate his minor children if he has the ability, and he has at common law no right to reimbursement for any expenditures for this purpose, and no allowance can be made to him out of the property of the children while his own means are sufficient; but when the father is not of sufficient ability to support them the court will order so much of their income to be applied to that purpose as is necessary. The child's fortune and the circumstances of the father will be considered in deciding what, if any, allowance should be made. The welfare of the child requires that he should be educated and maintained in accordance with the social posi-

tion which his means will enable him to enjoy, and the whole or any part of the expense thereof will be charged upon his estate, according as the circumstances of the father require. A parent should properly, before applying his child's income to its support, procure the sanction of the court, but the expense of past maintenance may be allowed on proper cause shown. The father, even if not needy, may maintain the child from any fund vested in him for that purpose. Although modern tendency is to hold that the mother is bound to support her child after the death of the father, yet the courts show special favor to the mother, and, if the child has property, they will charge the expense of its education and maintenance on said property, rather than force her to contribute,"—citing cases. "The court, in allowing maintenance, will generally restrict it to the income from the child's property; but where the property is small, and the income is not sufficient for his support, the capital may be broken into, although rarely to allow for past maintenance, when his future support will be thereby rendered doubtful,"—citing cases. In *re Besondy*, 32 Minn, 385 (20 N. W. Rep. 366), in delivering the opinion, the court says: "The law shows special favor to the mother, and her application for past maintenance will be granted in cases where that of the father would not be listened to. This, we apprehend, grows out of her naturally dependent position, and of the consequent reluctance of the courts to encroach upon her estate. We do not, however, undertake to say that her affirmative application for past maintenance will in all cases be granted when the child has property of his own, though his support was not intended to be a gratuity. The circumstances of the case might be such as to render it altogether inequitable. * * * The courts are not, ordinarily, careful to require of a mother who remains unmarried, as in the case of a father, that a special case be made showing the inadequacy of her own means, and the necessity of an allowance for that reason." See, also, *Pierce v. Pierce*, 64 Wis. 73 (24 N. W. Rep. 498); *Voessing*

v. Voessing, 4 Redf. Sur. 360; *Perkins v. Westcoat*, 3 Colo. App. 338 (33 Pac. Rep. 139); *Melanefy v. O'Driscoll*, 164 Mass. 422 (41 N. E. Rep. 654); Herrick & Docksee Prob. Law (2d ed.) 618; *Welch v. Burris*, 29 Iowa, 186; *Minor Heirs of Bradford v. Bodfish*, 39 Iowa, 681; *Gerdes v. Weiser*, 54 Iowa, 591. There can be no doubt from these authorities that upon a proper showing the defendant might have had an order of court allowing her to use the principal of the plaintiff's estate for her support. That, in the absence of such an order, a court of equity may, upon an accounting and proper showing, allow for past support, is well established by the authorities already cited. Parents are alike liable for the support of their minor children, and the authorities we have cited only apply when there is question as to the ability of either to furnish support. The favor shown to the mother is not because she is less liable than the father, but for the reason that usually she is less able to earn the support.

V. We have cited the authorities most favorable to the defendant that have come to our notice, and it is clear from them that the defendant was primarily bound for the support of the plaintiff, and that she would not be allowed to encroach upon plaintiff's estate, especially the principal thereof,

8 unless her own circumstances were such as to render her unable to furnish the support. We have seen that

the plaintiff's estate consisted of the four hundred and sixty-nine dollars and eighty-nine cents derived from the distribution of the personal property and fifty-two acres of farm land, and the defendant's of the farm, valued at seven thousand two hundred and thirty-three dollars, and personal property valued at four thousand four hundred and thirty dollars and ninety-eight cents. This was quite a competency to the defendant, and, well managed, should have brought her an income of about one thousand one hundred dollars a year,—quite a sum with which to support the family,—yet all of it appears to have been consumed. Courts are more ready to

- . allow the income to be used for support than the principal. We think, in view of the number of minor children, the manner in which they were supported and educated, and the amount of defendant's income, that she should be allowed the income of the plaintiff's estate towards her support and education. Assuming, as we may that the income of the other four children was the same as the plaintiff's, this gave the defendant an income of about one thousand six hundred dollars a year for the support of herself and family. Surely, the defendant, with this income, and an estate worth over eleven thousand five hundred dollars, should not be allowed to charge the principal of the plaintiff's estate for her support and education. We conclude that the plaintiff should have judgment against the defendant for the four hundred sixty nine dollars and eighty-eight cents cash received from the administratrix, with 6 per cent. per annum interest thereon from the 19th day of February, 1897, the date at which plaintiff became of age by marriage, and entitled to the money. The judgment of the district court is reversed, and the case remanded for judgment in harmony with this opinion.—REVERSED.

DEEMER, J.—I agree to the conclusion, but not to some of the statements of law announced in the opinion.

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111	640
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PARLIN, ORENSDORFF & MARTIN Co., Appellant, v. A. C. DANIELS, Defendant, and JOSIAH POORBAUGH, Intervener.

Delivery of Deed: REBUTTAL OF PRESUMPTIONS FROM POSSESSION. Where a non-resident defendant's real estate was attached at suit of a creditor, and defendant's father-in-law intervened, claiming title through a deed from defendant dated prior to the attachment, but not recorded till afterwards, and the evidence showed that defendant executed a lease of the premises

in his own name after the date of the deed, and received rent for one quarter after the levy of the attachment, and that, thereafter, intervener's son, who was also defendant's employe, received the rent, such evidence was sufficient to rebut the presumption of delivery arising from the intervener's possession of the deed, and hence an order dismissing plaintiff's petition and discharging his levy was erroneous.

SECRET TRUST: Evidence. Where a defendant debtor whose real estate is attached has executed a lease, and received rent as owner, after the delivery of a deed to his father-in-law, who intervenes in the action, and such deed is not recorded until 2 after the attachment, such circumstances constitute evidence of a secret trust in the intervener in favor of the defendant, and hence an order dismissing plaintiff's petition on the evidence and discharging the levy was erroneous.

Appeal from Story District Court.—HON. D. R. HINDMAN,
Judge.

THURSDAY, MAY 24, 1900.

THE plaintiff began suit on thirty-three notes executed by the defendant, amounting in the aggregate to one thousand three hundred and eleven dollars and thirty-three cents, on the fifth day of February, 1897. The defendant, A. C. Daniels, is a nonresident. On the same day a writ of attachment was levied on lot 4, block 10, in Collins, as his property. Due service was had by publication. March 22, 1898, Josiah Poorbaugh filed a petition of intervention, in which he averred his ownership at the time of the levy, acquired through a deed dated February 18, 1896, and filed for record March 8, 1897. The plaintiff, by answer, put in issue the averment of ownership, and alleged that the deed was fraudulent. Trial to the court resulted in an order dismissing the petition and discharging the levy. The plaintiff appeals.—*Reversed.*

J. F. Martin for appellant.

Funson & Gifford for appellee.

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LADD, J.—Possession of the deed was *prima facie* evidence of its delivery, and, but for circumstances indicating the contrary, it would be assumed to have been delivered at the time of its date. *Furenes v. Eide*, 109 Iowa, 511; *Robinson v. Gould*, 26 Iowa, 89. See cases collected in note to *Blanchard v. Tyler*, 86 Am. Dec. 63.

Though dated February 18, 1896, it was not recorded until March 8, 1897. When acknowledged, does not appear. January 29, 1897, Daniels was at Collins, and rented the lot as owner, signing a lease as such, and received rent for one quarter after the levy of the writ, February 5th previous. Thereafter, and up to April 1, 1898, the rent was paid to H. K. Poorbaugh, son of intervener, and employe of the defendant. He must be assumed, in the absence of any explanation, to have been acting therein for Daniels, as the obligation of the lessee runs to him. A son of intervener, who was manager of the defendant's hardware business at Collins, testified that he had learned something of this sale in February or January, 1897, and that he "did not know that any one owns the place but A. C. Daniels, and father, intervener herein, did not purchase the same." The evidence is very meager, and we are not sure the witness meant to be understood as saying his father had not in fact purchased, or that he did not know that he had not. While the recording of a deed is not essential as against an attaching creditor, its delivery is. And we think the evidence in this case, in the absence of any explanation, may well be deemed sufficient to overcome the presumption arising from the possession of the deed at the trial, and to indicate it did not pass to Poorbaugh before it was filed for record. The grantee was the defendant's father-in-law. The deed was withheld from record until needed to protect the property in Daniel's possession, and during all the time he controlled and leased the lot as his own and collected the rents.

But even if this presumption of delivery has not been overcome, the possession of the land, with the unequivocal acts of ownership over it, is a badge of fraud, which, in connection with the failure to record the deed, and the relationship of the parties to it, in the absence of all explanation, authorized the court to conclude that intervenor held the property in secret trust for the benefit of the defendant. See Wait Fraudulent Conveyance, section 265; Bump Fraudulent Conveyance, section 62. The petition of intervention should have been dismissed.—**REVERSED.**

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135 684

P. C. MERRILLAT V. SANFORD PLUMMER, T. B. DOTTS, AND
J. F. PLUMMER, Appellants.

False Representations: FACT AND OPINION. Where defendants, sued on a note given by them for the right to use a fence building machine, as to the merits of which they knew nothing, pleaded false and fraudulent representations in the procurement of the note, and want of consideration, the rejection of evidence to prove plaintiff's inducing statements as to the machine's capacity, and the amount of fence that could be built with it, based on plaintiff's own observation and knowledge was error, since such statements were representations of fact, and not mere expressions of opinion.

EVIDENCE: Admissibility. It was error to reject defendants' evidence as to the value of the machine and the work it was capable of doing, since such evidence was competent and material to show that it could not do the work plaintiff stated it had done and could still do.

Appeal from Wapello District Court.—HON. T. M. FEE,
Judge.

THURSDAY, MAY 24, 1900.

ACTION at law upon a note. Defense, want of consideration and fraud. There was a directed verdict for the

plaintiff and judgment thereon. Defendants appeal.—*Reversed.*

Steck & Smith for appellants.

W. R. Nelson for appellee.

SHERWIN, J.—The defendants' answer tendered the direct issues of fraudulent and false representations in the procurement of the note in suit, and want of consideration. The note was given for patent-right territory which was sold to the defendants by the plaintiff, acting as the agent of W. E. Funson and A. Olson, to whom the note was made payable. The right sold was the use of a fence-building machine, of the merits of which the defendants knew absolutely nothing. Upon the trial the defendants offered evidence to prove inducing statements made to them by the plaintiff as to the capacity of the machine and the amount of fence that could be built per day with it, based upon the plaintiff's own observation and knowledge. This was evidence tending to show false representation as to what the machine had already done, and based upon that, what it could do. It was the representation of a fact which was exclusively within the knowledge of the plaintiff, and not the expression of a mere opinion. The evidence was competent. *Machine Co. v. Williams*, 99 Iowa, 601. The court also rejected evidence offered by the defendant as to the value of the machine and the work it was capable of doing. Under the issue tendered, it was certainly competent and material to prove that it could not do the work the plaintiff stated it had done and could do still. *Clark v. Ralls*, 50 Iowa, 275. The other errors assigned are not likely to arise upon a retrial of the cause; consequently we do not notice them. For the errors noticed, the case is REVERSED.

JAMES MURPHY, Appellant, v. MARY CUDDIHY *et al.*

Judgment: RESTRAINING COLLECTION OF. Collection of default judgment will not be enjoined where defendant's liability could have been fully determined by proper action on his part, either in the original action or in a subsequent action to set aside a fraudulent transfer of his property to defeat collection thereof.

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111	645
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141	182
142	384

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144	193

Appeal from Keokuk District Court.—HON. DAVID RYAN,
Judge.

THURSDAY, MAY 24, 1900.

ACTION to set aside and enjoin the collection of a judgment. There was a decree for the defendants. Plaintiff appeals.—*Affirmed.*

C. M. Brown for appellant.

No appearance for appellee.

SHERWIN, J.—In 1896 suit was brought against the plaintiff and others on a promissory note signed by him as surety. He was duly served with notice, but made no appearance, and default and judgment were entered against him. Subsequent thereto an action was commenced against him setting up the judgment above referred to, and the fact that he had fraudulently transferred his property with intent to defeat the collection thereof. In that case he answered and pleaded some of the matters alleged in the petition herein. A trial on the merits was had, which resulted adversely to the plaintiff, and no appeal was taken therefrom. This is an action to set aside the original judgment and to permanently enjoin its collection. It cannot be maintained. The plaintiff has already had two days in court wherein the defendant herein, Mary Cuddihy, was plaintiff, and he the defendant, in both of which cases his liability on said note

might have been fully determined by proper action on his part. It is a familiar principle of the law, that parties cannot engage the courts in the relitigation of matters which were or might have been determined in former actions. *Hackworth v. Zollars*, 30 Iowa, 433; *Hempstead v. City of Des Moines*, 63 Iowa, 36; *Wolfinger v. Betz*, 66 Iowa, 594. The judgment of the district court is AFFIRMED.

BRIDGET COX v. THE CITY OF DES MOINES, Appellant.

Defective Sidewalks: KNOWLEDGE OF DEFECT AS MATTER OF LAW. Where a traveler had no knowledge of a particular defect in a sidewalk, and could not have discovered it by simply glancing at its surface, such knowledge cannot be inferred as a matter of law.

Appeal from Polk District Court.—HON. T. F. STEVENSON,
Judge.

THURSDAY, MAY 24, 1900.

ACTION at law to recover damages for injuries sustained by plaintiff while passing along one of the streets of defendant city, due to a defective sidewalk, which it is claimed defendant negligently permitted to become out of repair. There was a trial to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed*.

J. E. Mershon and L. W. Bannister for appellant.

James Nugent and W. A. Connolly for appellee.

DEEMER, J.—The defendant's negligence is conceded, and it is agreed that the only question for our consideration is plaintiff's contributory negligence. The instructions are not complained of and the one bearing on contributory negligence is in the usual form. The jury was authorized to find that plaintiff, while walking, with a companion, over a

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sidewalk in one of the streets of defendant city, caught her foot on a board which was raised by reason of her companion having stepped on one end thereof, and that she received her injuries in consequence thereof. Plaintiff had not been over the walk from December 23, 1897, until the day she received her injuries, which was on the thirteenth day of March, 1898. There were several boards out of place, but plaintiff did not pay any particular attention to them, and did not notice that some of them were gone until after she fell. She did not know there were any loose boards in the walk. As a matter of fact a number of boards were out, and some of them were loose, but there is no showing that plaintiff knew it was dangerous to pass over the walk in its then condition, except as such knowledge may be inferred from the fact that she was passing over it in the daytime, and could observe its general condition. Of course, she must be held to a knowledge of the fact that some of the boards were out, for she could not pass over the walk without observing that fact. But she was not bound as a matter of law to know that any of them were loose. Other evidence tended to show that persons using the walk noticed loose boards; but, as plaintiff had not passed over it before for some months prior to her fall, her knowledge must be confined to what she saw, or ought to have seen, as she passed along and over the sidewalk. The walk was open to the public, and travelers were impliedly invited to pass over the same. We have never held that it was negligence as a matter of law for one to pass over a defective walk. Knowledge of the danger is an important element to be considered; and, as a general rule in the absence of such knowledge, it is not negligence as a matter of law for one to pass over a defective sidewalk. *Sylvester v. Town of Casey*, 110 Iowa, 256; *Barnes v. Town of Marcus*, 96 Iowa, 676, and cases there cited. Whether or not it was imprudent for plaintiff to pass over this walk in the condition in which she found it, was a question of fact for the jury. It is true, that in some cases we have held plaintiff

guilty of contributory negligence as a matter of law, but in each case knowledge of the particular defect was shown, and appreciation of the danger was apparent. See *Cosner v. City of Centerville*, 90 Iowa, 33, and *Barce v. City of Shenandoah*, 106 Iowa, 426. These cases are exceptional, and the general rule is as above stated. In the case at bar plaintiff had no knowledge of the particular defect, and could not have discovered it by simply glancing at the surface of the walk. While the jury might have found that she had, or in the exercise of ordinary care ought to have had, notice of the defective and dangerous condition of the walk, we are not justified in holding as a matter of law that such knowledge should be inferred. The case is not as strong in its facts for defendant as *Hoover v. Town of Mapleton*, 110 Iowa, 571, wherein we held the question of contributory negligence was for the jury. The issues were properly submitted to the jury, and with their findings we should not interfere.—AFFIRMED.

STATE OF IOWA V. F. H. GIFFORD, Appellant, AND H. E. J. BOARDMAN.

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Mulct Law Violation: SINGLE DOOR. Under Acts Twenty-fifth General Assecmbly, chapter 62, section 17, clause 3, providing that the sale of liquors shall be carried on in a single room, having but one entrance on a public business street, and that compliance with conditions therein is a bar to prosecution under the prohibitory law; and section 19, declaring that, on violation of such provisions, persons engaged in the business

1 shall be liable to prosecution for penalties provided, where defendant caused a door to be opened from a single room in which he conducted his saloon into a back room, where he stored liquors, and through which he carried beer and ice to the saloon, it was not error to grant perpetual injunction from carrying on a liquor nuisance, as the statute was violated by maintaining such door, though only for the convenience of the proprietor and his employes.

MISTAKE OF LAW NO DEFENSE. Defendant's violation of law through

2 mistake of law furnished no excuse.

ATTORNEY FEE ON APPEAL. In an action for an injunction to abate a
4 liquor nuisance, the attorney is herein and on appeal allowed a
fee of \$25.00 in this court.

Original Notice: DEFECTIVE COPY SERVED: *Review on appeal.* Where,
in a suit to enjoin a liquor nuisance, a default against the
owner of real estate was set aside, and the petition dismissed
as to him, on the ground that the amended return of the sheriff
3 showed that the copy of the original notice delivered to him did
not contain a description of the real estate contained in the
notice, and it does not appear on appeal what the original no-
tice did contain, the decree will be affirmed.

Appeal from Marshall District Court.—HON. OBED CAS-
WELL, Judge.

THURSDAY, MAY 24, 1900.

ACTION to enjoin a liquor nuisance. Decree was en-
tered as prayed against all of the defendants except H. E. J.
Boardman. As to him the petition was dismissed. F. H.
Gifford and the state appeal, that of Gifford being first per-
fected.—*Affirmed.*

J. M. Parker for appellant.

B. F. Cummings, County Attorney, and *J. L. Carney*
for the State.

C. H. E. Boardman for H. E. J. Boardman.

LADD, J.—There was no error in entering a decree
against Gifford. According to his own testimony, he had
violated at least one of the conditions on which the bar to
proceedings under the prohibitory law depended. He tes-
tified that, after beginning business under the mulct
1 law, he caused a doorway to be opened from the
single room in which he conducted his saloon
into a back room, in which he used to store liquors and
through which he carried beer and ice to the saloon from the
alley. In maintaining this doorway from the back of his
saloon into a storeroom, he disregarded the plain prohibition

of the statute. It is the existence of the entrance or exit other than that allowed which is condemned, and not its use for any particular purpose. No exception is contained in the statute, and a doorway may not be maintained even for the convenience of the proprietor and his employes. *State v. Bussamus*, 108 Iowa, 11; *Ritchie v. Zalesky*, 98 Iowa, 589.

II. Under section 19 of chapter 62 of the Acts of the Twenty-fifth General Assembly, the bar of the statute was removed by the violation of the condition contained in the third clause of section 17, requiring that the "selling or keeping for sale of intoxicating liquors shall be carried on in a single room, having but one entrance or exit, and that opening upon a public business street." This bar having been removed, the remedy by injunction under the general prohibi-
2 tory law might be invoked by the state. The appellant urges that, as he did not intend to break the law, he should not have been held to have kept his place for the unlawful traffic in intoxicating liquors. Whether, in event of a mistake of fact, as where sales are made to minors under the reasonable supposition that they are of age, a writ of injunction ought to issue, we do not determine. But a mistake of law furnishes no excuse, for that every one is presumed to know, and this particular provision is too explicit to be misunderstood.

III. The petition alleged that Boardman was owner of the premises, and also that he, with others, was maintaining a nuisance. The court entered a default, but subsequently, as to him, dismissed the petition. The re-
3 turn of the sheriff, as amended, shows "that the copy of the original notice delivered to H. E. J. Boardman did not contain any description of the real estate contained in this notice." What the original notice did contain, does not appear. Every presumption must be indulged in favor of the correctness of the decree. *Johnson v. Otto*, 105 Iowa, 605. And, in the absence of any showing to the contrary, it will be assumed that the notice did not advise Board-

man that any relief was sought against the premises in controversy. No claim was made against him, except as such owner.

4 An attorney's fee of twenty-five dollars will be taxed in behalf of the plaintiff's attorneys for services rendered in this court.

Some other matters are discussed, but what we have said disposes of the case, and the decree, on both appeals, is AFFIRMED.

F. W. GREAVES & COMPANY, Appellant, v. RACHEL POSNER,
Defendant, COVENANT MUTUAL LIFE INSURANCE
COMPANY, Garnishee.

Garnishment: SERVICE UPON AUDITOR OF STATE: *Foreign insurance companies.* Code, section 1722, requires a foreign insurance company to file an agreement that service of process on the state auditor shall be binding on it, as a condition precedent to the right to do business in the state. *Held*, that where a foreign insurance association transacted no business within the
2 state between the date it received proof of a member's death,—
3 the benefits being payable 90 days thereafter—and the day
4 when the required agreement was filed, the auditor had no authority, during such interim, to receive service in garnishment in an action against the member's beneficiary, and, hence, the beneficiary's motion to discharge the association for want of jurisdiction was properly sustained.

MOTION TO DISCHARGE. Under Code, section 3948, authorizing a defendant to set up facts showing that the debt or property sought to be charged in garnishment is exempt from execution,
1 or is, for any other reason, not liable for plaintiff's claim, by suitable pleadings, a defendant is entitled to claim a discharge of the garnishment, by motion, on the ground that the property was exempt; that the garnishee was never served with notice, and that the situs of the debt was in another state.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

THURSDAY, MAY 24, 1900.

ACTION begun November 19, 1897, to recover the sum of nine hundred and seventy-four dollars and fifty-eight cents due on note and account, aided by attachment. Service of notice of the garnishment on the Covenant Mutual Life Association of Galesburg, Ill., was accepted by the auditor of state, November 23, 1897. The defendant's answer put plaintiffs to their proof, and in a counterclaim damages were sought for the wrongful suing out of a writ of attachment. September 22, 1898, the defendant moved to quash the garnishment proceedings and discharge the Covenant Mutual Life Association as garnishee. This was resisted by plaintiffs, but the motion was sustained, and this appeal involves the correctness of that ruling.—*Affirmed*.

McVey & McVey for appellants.

Read & Read for appellee.

LADD, J.—The defendant's right to ask for the discharge of a garnishment can no longer be tested by the earlier decisions of this court. See *Wales v. City of Muscatine*, 4 Iowa, 302; *Pomroy v. Parmlee*, 9 Iowa, 140; *Hastings v.*

Phoenix, 59 Iowa, 394. Section 3948 of the Code expressly authorized her “by suitable pleadings to set up facts showing the debt or property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim.” The other reasons here asserted are (1) that the garnishee has never been served with notice, and (2) that the situs of the debt is in Illinois. In either event, the money due would not be liable here for the plaintiff's claim. The remedy by motion to discharge was clearly available to the defendant.

II. Jacob Posner died September 7, 1897, and the insurance certificate of the Covenant Mutual Life Association was payable to his wife, this defendant. Proofs of loss were completed October 15, 1897, and the indemnity payable ninety days thereafter. This action was begun November 19, 1897, and the auditor of state under-

took to accept service of the notice of garnishment in behalf of the association, November 23d. In this, he acted wholly without authority. It is not important to inquire how the law formerly stood, as it is conceded to have been repealed by Code, section 49. *West v. Bishop*, 110 Iowa, 401. The society began business in the state in 1886, and, as its designated attorney had been dead several years, all service of process or notice, prior to October 1, 1897, was properly had on the state auditor. But under the Code such associations, as a condition precedent to doing business in the state, were required to "file in the office of the auditor of state an agreement in writing that thereafter service of notice or process of any kind may be made on the auditor of state, and when so made shall be as valid, binding, and effective for all purposes as if served upon the company according to the laws of this or any other state and waiving all claim or right of error by reason of such acknowledgment of service." Section 1722. It will be observed that by this written agreement power is conferred on the auditor to acknowledge service, and not independent of it. Without such consent he might not act in behalf of the association. No one questions the right of the state to prescribe the method by which corporations doing business within its limits may be brought into court, and if they persist in transacting business in the state doubtless they will not be heard to plead noncompliance with this statute. *Sparks v. Association*, 100 Iowa, 459.

But no agreement was on file before December 2, 1897, and the evidence fails to show the transaction of any business by the garnishee between October 1st and that date. The association had a reasonable time within which to settle upon the course it would pursue, and the law indulges in the presumption, in the absence of proof to the contrary, that in the meantime it yielded obedience to this statute.

3 Its annual report indicates a large amount of business during the year, but not in this interim, and it does

not appear from the record that any insurance certificates were issued. True, an applicant was examined by the local medical examiner, though with what result is not disclosed, save that the doctor received his fee the following year. There is no ground whatever upon which to base an estoppel, and bring the cause within the rule of the *Sparks Case*.

4 No jurisdiction over the Covenant Mutual Life Association was acquired, and defendant's motion to discharge it as garnishee was rightly sustained. There is no merit in the motion to strike appellee's amendment to abstract, and it is overruled.—AFFIRMED.

MARY E. MILLER, Appellant, v. MILLS COUNTY, IOWA.

Adverse Possession: CLAIM OF TITLE: *Mistake*. Possession of an
3 adjoining owner's land by mistake, and without intention to assert title thereto, is not adverse.

Boundaries: BY RECOGNITION. A division line between adjoining
1 tracts, definitely marked by the maintenance of a fence recog-
4 nized by the owners as such division line, and up to which
5 they have cultivated the land on either side for more than ten years is the true boundary line between them.

ACQUIESCENCE AS EVIDENCE. Acquiescence in a marked line as forming the boundary between adjoining owners furnishes some evi-
2 dence that it is the true line, but its weight is somewhat dependent on the period of acquiescence.

Appeal from Mills District Court.—HON. A. B. THORNELL,
Judge.

THURSDAY, MAY 24, 1900.

THE plaintiff is the owner of the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 21, township 72, range 42, Mills county; and the defendant, of the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of said section. In July, 1897, the defendant removed one hundred and eighty feet of the fence on the north end of the

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119 169
e119 568

111 654
f121 80
121 616
122 414
d122 693

111 654
f124 400
f124 735

111 654
127 175

111 654
e129 63
e129 64
d130 190
130 352

111 654
131 169
131 717

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132 80

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134 481
134 664

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135 362

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136 26
136 733

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138 434

boundary, recognized since 1860, from sixteen to twenty feet to the west, and took possession of the intervening strip. This is an action to eject the defendant therefrom. Trial to the court, and from a judgment dismissing her petition the plaintiff appeals.—*Reversed*.

W. S. Lewis and C. E. Dean for appellant.

Shirley Gilliland for appellee.

LADD, J.—Between the forties is a hedge, which previous to 1897 formed the lower part of the division fence. This was set out by the defendant's grantor, Jesse Miller, in 1867, as close as possible to the east side of a board fence which had been erected by him along the entire line in 1860. At that time the government monuments at the northeast corner of the section and at the quarter corner to the west were intact, and stakes for the division fence were set with reference to them,—whether by measurement, does not appear. The hedge was trimmed and cared for by Jesse Miller and the county, which acquired title from him for use as a poor farm, about twenty years ago since being set out, and for at least thirty-one years the land has been occupied and cultivated up to that line. The plaintiff acquired the adjoining land in 1890 from Wright, who had been in possession as owner ten years. During these eighteen
1 years the plaintiff and her grantor maintained the north portion of the division fence,—being of board and wire,—and during that time occupied and cultivated the land up to the division line so marked. Until April, 1897, no one had questioned the correctness of the boundary as indicated by these fences, save a suggestion by plaintiff's husband that the government line was east of them. At that time the county surveyor, while doing some work on the poor farm, was induced by the superintendent and plaintiff's husband to undertake to ascertain the line according to the government survey. He testified that he did not make a survey

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of the forties so as to fix all their lines and corners; that he ran a line between the sections, and though the center of section twenty-one, east and west, and then from a temporary corner, placed on the center line, run the north and south line between the forties. This was not chained, but he said: "I probably set up my instruments and took a snap shot." The superintendent testified: "We went to the southwest corner of section twenty-one, ran east to the road, then came back, running the line between Miller and other lands; then north and east to the road, and found the corner there. We then ran the line between the county's and Miller's land." The surveyor knew of no other survey, and evidently did not make use of the government field notes. It should be added that conveyances of this land and assessments have always been made by government subdivisions. In June, 1897, the defendant, through the superintendent of its farm, set the north one hundred and eighty feet of the fence to the west from sixteen to twenty feet on the line indicated by the survey, and this action was brought by the plaintiff to recover possession of the intervening strip.

I. It will be observed that the facts are not in controversy, and it may well be doubted whether a survey of this character furnishes any better evidence of the line established by the government than the location of the hedge and board fence by the parties making the division line, followed by long acquiescence therein. *Case v. Trapp*, 49 Mich. 59 (12 N. W. Rep. 908); *Tarpenning v. Cannon*, 28 Kan. 665. Indeed, it seems to be the settled doctrine in New York that the practical location and long acquiescence in a boundary line are conclusive, not on the ground that they are evidence of a parol agreement fixing it, but because they are proof that the location is correct,—of so strong a character as to preclude evidence to the contrary. *Reed v. Farr*, 35 N. Y. 113; *Baldwin v. Brown*, 16 N. Y. 364. In the last case it was said: "Acquiescence, in such cases, affords ground, not merely from inference of fact to go to the jury as evidence

of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that a party is precluded from offering any evidence to the contrary. Unless the acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance." It should not be overlooked that there was no government survey in that state, and the reasons which obtain in support of these decisions

2 have not the same weight when applied to conditions in this state. However, it may be safely asserted that all the authorities agree that acquiescence in a marked line, as forming the boundary, furnishes some evidence that it is the true line; its weight depending somewhat on the period of such acquiescence.

II. But, if it be conceded that this survey tended to fix the location of the government line as originally established, it does not follow that it should be regarded as the boundary between the coterminous owners. The preliminary fact always to be ascertained in cases of this character is not the location of the line according to the government survey, but the true boundary between the adjoining properties. Until this has been done, the issue of adverse possession is not raised; for, if the fence or monuments marking the divisions between them indicate the true boundary, neither is in the occupancy of land to which the fee is in the other. Only when the boundary up to which each has been in possession is found to be erroneous, and the true line ascertained, is the character of the possession of the intervening

3 strip the subject of inquiry. It has long been the settled doctrine of this state that when this has been proven, and such possession is by mistake, and without intention to assert title thereto beyond the true boundary, if it should turn out to be a part of the adjoining owner's land the possession is not adverse; for, in the absence of title, or color thereof, the essential element of adverse pos-

session—claim of right—is lacking. *Grube v. Wells*, 34 Iowa, 148; *Fisher v. Muecke*, 82 Iowa, 547; *Goldsborough v. Pidduck*, 87 Iowa, 599; *Skinner v. Crawford*, 54 Iowa, 119; *Wacha v. Brown*, 78 Iowa, 432; *Jordan v. Ferree*, 101 Iowa, 444. If, however, such possession, though taken by mistake, is with the intention to claim title to the division line, and thus, if necessary, acquire “title by prescription,” it may ripen into title. *Fullmer v. Beck*, 105 Iowa, 518; *Doolittle v. Bailey*, 85 Iowa, 398; *Heinrichs v. Terrell*, 65 Iowa, 25. In other words, the possession of the strip of land beyond the true boundary, taken by mistake, may or may not be adverse. It is not the mistake, but the presence or absence of an intention to claim title, that fixes the character of the entry, and determines the *disseisin*. *Preble v. Railroad Co.*, 85 Me. 260 (27 Atl. Rep. 149, 21 L. R. A. 829); *Wilson v. Hunter*, 59 Ark. 626 (28 S. W. Rep. 419, 43 Am. St. Rep. 63); *Watrous v. Morrison*, 33 Fla. 261 (14 South Rep. 805, (39 Am. St. Rep. 139). The necessity of such intent is questioned by many authorities; holding that the reasons which influence the entry are not material, provided it was under claim of ownership, and continued in the belief in its rightfulness. The cases are about equally divided, and will be found collected in a note to *Finch v. Ullman* (105 Mo. Sup. 255, 16 S. W. Rep. 863, 24 Am. St. Rep. 383).

III. Under either of these rules, however, the first inquiry always is, where is the true boundary between the tracts of land? And it may be remarked that there is nothing about the government surveys entitling them to reverence. The original purpose was to enable the government to dispose of the public domain in parcels accurately defined. That they abound in mistakes is notorious, and is evidenced in the reported decisions of nearly every state save the original thirteen. Nor are the ordinary surveyors quite infallible. Their successive surveys nearly always disagree. This, aside from frequent carelessness or incompetency, is in-

evitable, from the variations of the needle, and slight differences in measurements over uneven ground. Reference is had to the government survey as pointing out the lines by which the lands described in the patents passed from the government, and by which they are ordinarily transferred by deeds. But if the coterminous owners have
4 adopted another line as their division line, and have occupied up to it and recognized it as such for a period of ten years, there appears to be no reason for not regarding it as the true boundary line, notwithstanding it is not that fixed by the government survey. *Tracy v. Newton*, 57 Iowa, 210; *Hiatt v. Kilpatrick*, 48 Iowa, 78; *Foulke v. Stockdale*, 40 Iowa, 99. There was no express agreement between the parties to this case, or their grantors, that the fence be regarded as marking the boundary between their respective tracts of land, but the circumstances are such that an agreement ought to be implied. For more than eighteen years they have occupied up to and acquiesced in the division fence, and maintained it as the true boundary between them. They adopted it by their unmistakable acts, which in any other transaction would have all the force of implied contracts. *Davis v. Curtis*, 68 Iowa, 63. The authorities quite generally hold that, in the absence of controlling circumstances, acquiescence in a division line, assumed or established, accompanied by actual occupancy in accordance therewith by the adjoining owners for a period equal to that prescribed in the statute of limitations within which an entry may be barred, is conclusive evidence of such an agreement. The rule will be found perspicuously stated in *Sneed v. Osborn*, 25 Cal. 628: "The acts of the parties may not amount to an agreement between them to locate the tract as surveyed, and it is unnecessary to consider them in that view; but do they not show an acquiescence by the parties in those lines between the tracts of land? If they do show such acquiescence, it will make no difference in the result, that they acted in ignorance or under a mistake as to the true

northern line of the northwest quarter of the Harrison tract. The authorities are abundant to the point that when owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of the deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned must at least equal the length of time prescribed by the statute of limitations to bar a right of entry." To the same effect, see *Burris v. Fitch*, 76 Cal. 395 (18 Pac. Rep. 864); *Wingler v. Simpson*, 93 Ind. 203; *Ball v. Cox*, 7 Ind. 453; *Dyer v. Eldridge*, 136 Ind. 661 (36 N. E. Rep. 522); *Hubbard v. Stearns*, 86 Ill. 35; *Sheets v. Sweeney*, 136 Ill. 336 (26 N. E. Rep. 648); *Gilchrist v. McGee*, 9 Yerg. 455; *Diehl v. Zanger*, 39 Mich. 602; *Joyce v. Williams*, 26 Mich. 332; *Stewart v. Carleton*, 31 Mich. 270; *Berry v. Garland*, 26 N. H. 473; *Rockwell v. Adams*, 7 Cow. 761; *O'Donnell v. Penney*, 17 R. I. 164 (20 Atl. Rep. 305); *Gwynn v. Schwartz*, 32 W. Va. 487 (9 S. E. Rep. 880); *Crowell v. Beebe*, 10 Vt. 33 (33 Am. Dec. 172). See sections 4233, 4236, Code. True, there are cases holding that acquiescence for any particular time is not conclusive. See *Floyd v. Rice*, 28 Tex. 341. And others entirely ignore acquiescence as furnishing evidence of boundary. See *Davis v. Caldwell*, 107 Ala. 526 (18 South. Rep. 103); *Worcester v. Lord*, 56 Me. 265. But the great current of authority sustains our conclusion that, in the absence
5 of other controlling circumstances, the inference is conclusive that the division line between adjoining tracts, definitely marked by the erection and maintenance of a fence or other monuments, recognized by the owners as such, and up to which they have occupied and cultivated the land on either side more than ten years,—the statutory period of limitations,—is the true boundary between them. The period adopted by the courts is evidently in analogy with the statute of limitations. See authorities collected in

4 Am. & Eng. Enc. Law, 864 *et seq.* This doctrine seems to find direct approval in *Burdick v. Heivly*, 23 Iowa, 511. It is not clear from that opinion whether the parties agreed upon the line, or merely made up their minds where it was; but the court, through Lowe, J., said. "The above facts attending the placing of the fence at the mutual cost of both parties show that it was meant and intended as a division line between them; and this, acquiesced in for the statutory period of ten years, should be regarded as establishing the defense in this case." The contention that this might be obviated by a showing of mistake was rejected. The same doctrine seems to have been applied in *Crapo v. Cameron*, 61 Iowa, 448; *Crismon v. Deck*, 84 Iowa, 349; and *Sherman v. Hastings*, 81 Iowa, 372. It is not in conflict with *Grube v. Wells*, 34 Iowa, 148, as there the adjoining owner had been in the actual occupancy but four or five years; nor with *Fisher v. Muecke*, 82 Iowa, 547, and *Goldsborough v. Pidduck*, 87 Iowa, 599, as the adjoining tracts in these cases were vacant. The duration of the occupancy is not disclosed in *Skinner v. Crawford*, 54 Iowa, 119, or *Wacha v. Brown*, 78 Iowa, 432. In *Heinz v. Cramer*, 84 Iowa, 497, the period was less than ten years. The question is stated in *Jordan v. Ferree*, 101 Iowa, 444, and disposed of by reference to the above authorities, none of which treat of long acquiescence as evidence of the location of the true boundary. From the facts appearing, it may be safely said that, as the defendants there began to improve in 1892, their actual occupancy had not equaled the statutory period of limitations. And it is well to say that *State v. Welpton*, 34 Iowa, 145, extends the doctrine of *Grube v. Wells*, *supra*, and like cases, so far as to entirely ignore acquiescence as affording any evidence of the true division line. But that question was given no consideration whatever; the then recent case of *Burdick v. Heivly*, *supra*, not being noticed. The decision, however, was distinctly overruled in *Sherman v. Hastings*, 81 Iowa, 372, though not referred to in that opinion. It

has been cited frequently with approval, but never as excluding long acquiescence as proof of the true boundary. In the above cases the issue of adverse possession, and not the location of the boundary by acquiescence, was the subject of investigation. The effect of acquiescence in a division line as evidence of the true boundary has not heretofore been touched upon, save as mentioned; and our conclusion is only in conflict with *State v. Welpton, supra*, which has been overruled, and some language contained in *Jordan v. Ferree, supra*. Such a rule tends to prevent uncertainty in division lines, and to avoid litigation resulting from the disturbance of boundaries long established. As the hedge and board fence was shown to mark the true boundary between the parties, regardless of the location of the government lines, the petition ought not to have been dismissed.—**REVERSED.**

STATE SAVINGS BANK OF ROLFE, Plaintiff, v. JOHN RATCLIFFE *et al.*, Appellants, Defendants.

Correction of Record on Appeal: JURISDICTION OF DISTRICT COURT. Under Code, section 4127, authorizing the trial court to make such orders as will secure a perfect record, such court has jurisdiction to correct a notice of appeal filed in the district court, by sustaining a motion to strike therefrom what purports to be the names of attorneys for defendant, on the ground that their signature had not been, in fact, appended to such notice.

MOTION TO CORRECT: *Timely filing.* Where no time is fixed within which to make application for the correction of a notice of appeal, only laches or equitable reasons can defeat it.

VOID NOTICE: *Acceptance of service.* Acceptance of service of an unsigned notice of appeal does not estop from insisting on the defect, as such notice is jurisdictional, an unsigned notice being no notice and the supreme court acquiring no jurisdiction without such notice, though there be consent of parties.

Appeal from Pocahontas District Court.—HON. F. H. HELSELL, Judge.

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THURSDAY, MAY 24, 1900.

ACTION for the conversion of certain personal property. A jury was waived, and the case was tried to the court, resulting in a judgment for plaintiff. What is denominated a "notice of appeal" was served within the time required by statute for taking appeals, but, as this notice is challenged, our attention will be directed to the sufficiency thereof.—*Affirmed.*

Carr & Parker and *S. H. Kerr* for plaintiff, appellee.

Crisman & Holbrook for defendants, appellants.

DEEMER, J.—Notice of appeal, purporting to be duly signed, with acceptance of service thereon by attorneys for plaintiff, was duly filed with the clerk of the district court. The acceptance of service was within the time required by law, and on the face of it the notice is sufficient to give us jurisdiction. Some time after the paper was filed
1 plaintiff's counsel moved for a correction thereof in the district court by striking out the names of defendants' attorneys, purporting to be appended to the notice. A showing was made in support of this motion, from which the trial court found that the notice was not in fact signed when accepted by plaintiff's counsel, and it made an order correcting the same accordingly. From this order an appeal was taken. There is no doubt that the evidence before the trial court fully justified the order correcting the notice. But it is said the court had no jurisdiction to correct it. Section 4127 of the Code seems to confer jurisdiction on the trial court to make such an order. No time is fixed
2 by statute within which to make application, and nothing but laches or equitable reasons will defeat it. *Fisher v. Railway Co.*, 104 Iowa, 588; *Risser v. Martin*, 86 Iowa, 392. But it is said the court should have considered certain correspondence between the parties as constituting notice. If that be true, it gave no ground for hold-

ing that the notice of appeal was in fact signed. The notice to correct was filed in time, and was properly sustained. As the notice was not signed, it was no notice. *Doerr v. Association*, 92 Iowa, 39. As plaintiff's attorneys accepted service of the paper, it is argued that they are estopped from claiming no notice. That question is also settled by the *Doerr Case*, *supra*. The correspondence passing between the parties is not relied on as sufficient in this connection, and we have no occasion to consider whether the letters passing between the parties cured the defect. There must be a notice of appeal, to give us jurisdiction. Consent of parties will not take the place of notice. As we have no jurisdiction, the main case must be dismissed, and the appeal from the order correcting the record AFFIRMED.

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140	228

STATE TRUST COMPANY, Appellant, v. M. P. TURNER.

Stockholders: PAYMENT FOR STOCK. Where property is received by a corporation at a speculative and excessive valuation in payment for shares of its stock, it is only a payment to the extent of the property received, and the owner of such stock is liable to the creditors for the difference between the true value of the property and the face value of the stock.

RIGHTS OF ASSIGNEE. Where a payee takes a note from a corporation, with knowledge that its stock was exchanged for property at an excessive valuation, his assignee, after maturity, who has secured judgment on the note against the corporation, cannot recover on such judgment against an owner of the stock, because he has not paid the full value of his stock, since such assignee has no greater rights against such owner than his assignor had.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

THURSDAY, MAY 24, 1900.

ACTION at law to recover of defendant the amount of a judgment held by plaintiff against a corporation known as

the Hess Electric Storage-Battery Company. The case was tried to the court on an agreed statement of facts, resulting in a judgment for defendant. Plaintiff appeals.—*Affirmed.*

Bowen & Brockett for appellant.

Phillips, Ryan & Ryan for appellee.

DEEMER, J.—The Hess Electric Storage-Battery Company is a corporation organized under the laws of this state in the year 1890. It was created “to perfect a storage-battery system patented by one H. K. Hess, and to adapt it to practical use for light and power; the buying and selling of the patent and any other necessary and proper article to be used herewith; to procure other letters patent; and to buy and sell electric light plants, patents, batteries, etc.; and to lease, purchase, or sell electric current for any legitimate purpose.” The capital stock was fixed at one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, of which not exceeding ninety thousand dollars might be issued and used as fully paid for the purchase of patents or property to be used in the business. The balance of the stock was to remain as treasury stock, and sold to such persons and on such terms as the board of directors should determine; none of it to be issued, however, until fully paid. The articles were signed by H. C. Porter, H. K. Hess, A. R. Case, defendant, and others. Defendant was vice-president and a director of the corporation. After the filing of the articles, Porter, Case, and Hess made a proposition to sell certain patents which they claimed to own and hold, to the corporation, for ninety thousand dollars of its capital stock, fully paid up, and an additional sum of five hundred dollars in cash as soon as the corporation was able to pay. The board of directors of the corporation accepted the proposition, and Porter, Case, and Hess made an assignment of their patents, and of such property as they had on hand for experimental and manufacturing purposes, to the

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corporation, and received from it ninety thousand dollars of its fully-paid stock. The books of the corporation show that, the day before the aforesaid proposition was made, ten shares of stock, of the face value of one thousand dollars, were issued to defendant, Turner. This stock recited that it was fully paid. Turner paid nothing to the corporation for the stock, but the same was treated by all parties as a part of the ninety thousand dollars to be issued to Porter *et al.*, and was issued to him on their order. He paid Porter and his associates twenty cents on the dollar in cash for the stock, and has owned the same to this day. On the day the proposition was made, twenty shares of the stock were issued to Porter; but he never received them, and the books show that they were canceled and reissued to D. H. Gouging and T. S. Catcart. Ten of these shares issued to Gouging were canceled, and new certificates for the same were issued to defendant. The other ten of these twenty shares were also canceled and reissued to defendant. Neither Turner, Gouging, nor Porter paid anything to the corporation for this stock, but it was treated as a part of the ninety thousand dollars hitherto mentioned. Turner paid Gouging twenty cents on the dollar for the stock issued to him. The remainder of the ninety thousand dollars in stock was issued as follows: ten shares to R. R. Ballis, ten to F. B. Collins, ten to George C. Boggs, five to O. L. F. Browne, five to D. W. Chase, five to A. I. Lee, five to J. H. Woods, five to F. A. Fields, and five to W. H. Langan, all of whom had signed the original articles of incorporation; and the balance was issued to Porter *et al.*, or to other persons on their order. The stockholders have never held a meeting, but the board of directors held meetings until the latter part of the year 1894, since which time it has held no meetings. It was also agreed as follows: "(6) That the chemicals, material, and property mentioned in the said written proposition, including tools and instruments intended or adapted to the manufacture of batteries and motors, or used or intended for experiment,

were of the value of \$500, and at the time of the purchase of said property by the said Hess Electric Storage-Battery Company, as hereinbefore stated, the said patented articles had not been put largely into practical use, but many experiments and tests had been made with reference to its practical utility, all of which were known to the said Hess Electrical Storage-Battery Company, and its tests and experiments had shown satisfactory results; and the incorporators believed at the time of said purchase of said patent and property that the same was of very great value, and hoped and believed said company would realize therefor and thereon largely more than the ninety thousand dollars paid therefor. (7) That the said incorporators and stockholders of said incorporation continued to experiment with and test said patented articles until late in the year 1894, receiving numerous offers for the purchase of territory and for the placing of the same in use upon cars and otherwise, many of which offers were rejected by said Hess Electric Storage-Battery Company because of the belief that said patents and the use of said patent articles were worth more than the offers made therefor, and for the use thereof; that during said period other inventions for the use and application of electricity as a motive power were discovered and invented, whereby and by reason whereof the Hess Electric Storage-Battery Company has not, so far, been able to realize revenues therefrom to any large extent,—that is to say, the said corporation has not been able to make any sales satisfactory to said company, and the said patents and property have never brought to the corporation any remuneration adequate to meet its entire expenditures.”

In September of the year 1893 the corporation borrowed of the Commercial Loan Association the sum of six hundred and seventy dollars, and executed its notes therefor, due one month after date. The loan association had knowledge of all the facts hitherto recited regarding the organization of the corporation, and of the manner in which it had issued and disposed of its stock, and was fully

cognizant of all the facts regarding the purchase and sale of the patents and property, and of the value thereof. After the maturity of the note, the loan association transferred the same to plaintiff. Plaintiff recovered judgment thereon against the corporation, and after an execution had been issued, and returned "No property found," it commenced this action. On these facts the case was tried to the court, resulting in a judgment for defendant, and from that judgment the appeal is taken.

Involved primarily is the so-called "trust-fund doctrine," as applied to stockholders' obligations to creditors. This is founded on the proposition that as the state undertakes to relieve the stockholder in a corporation of general liability for the debts of the concern, to the amount that he has invested in the enterprise, he ought, in good faith, to pay in money or its equivalent the face value of the stock received; and, if he fails to do this, he should be treated as holding the remainder in trust for the benefit of the creditors of the corporation. From this proposition two apparently conflicting and inconsistent rules have grown up, one of which may be called the "true-value rule," and the other the "good-faith rule." Courts adopting the good-faith rule are also divided on the proposition as to what is necessary to be shown to constitute good faith. Some of them hold that, in the absence of an affirmative showing of fraud *aliunde*, mere overvaluation of the property given in exchange for stock will not render the stockholder liable for the difference, while others hold that overvaluation itself, especially if gross, constitutes, or at least raises a strong presumption of, fraud. The development of the trust-fund doctrine may be gathered from a reading of the following: *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Sawyer v. Hoag*, 17 Wall. 610 (21 L. Ed. 731); *Handley v. Stutz*, 139 U. S. 427 (11 Sup. Ct. Rep. 530, 35 L. Ed. 227), and cases cited therein; *Hollins v. Iron Co.* 150 U. S. 371 (14 Sup. Ct. Rep. 127, 37 L. Ed. 1113); *Osgood v. King*, 42 Iowa,

478. Cases holding to the true-value doctrine are as follows: *Van Cleve v. Berkey*, 143 Mo. 109 (44 S. W. Rep. 743, 42 L. R. A. 593); *Joseph v. Davis*, Ala* (10 South. Rep. 830); *Gates v. Stone Co.*, 57 Ohio St. 60 (48 N. E. Rep. 285); *Haldeman v. Ainslie*, 82 Ky. 395; *Libby v. Tobey*, 82 Me. 397 (19 Atl. Rep. 904); *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407 (9 South. Rep. 129, 12 L. R. A. 307); *Clayton v. Knob Co.*, 109 N. C. 385 (14 S. E. Rep. 36); *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427 (47 N. W. Rep. 726). Some of those holding to the first division of the good-faith rule are *Smith v. Prior*, 58 Minn. 247 (59 N. W. Rep. 1016); *Schenck v. Andrews*, 57 N. Y. 147; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Graves v. Brooks*, 117 Mich. 424 (75 N. W. Rep. 932); *Coit v. Amalgamating Co.*, 119 U. S. 343 (7 Sup. Ct. Rep. 231, 30 L. Ed. 420); *Kelley v. Fletcher*, 94 Tenn. 1 (28 S. W. Rep. 1099); *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 43 U. S. App. 452 (23 C. C. A. 302, 75 Fed. Rep. 554); *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068; *New Haven Horse-Nail Co. v. Linden Springs Co.*, 142 Mass. 349 (7 N. E. Rep. 773). And of those holding to the second division are *Douglass v. Ireland*, 73 N. Y. 104; *Boynton v. Andrews*, 63 N. Y. 96; *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28 (67 N. W. Rep. 652); *Kelly v. Mining Co.*, 21 Mont. 291 (53 Pac. Rep. 959, 42 L. R. A. 621); *Lloyd v. Preston*, 146 U. S. 630 (13 Sup. Ct. Rep. 131, 36 L. Ed. 1111); *Wallace v. Manufacturing Co.*, 70 Minn. 321 (73 N. W. Rep. 189). It will be noticed that there is some confusion in the New York and United States supreme court cases, and it is difficult to say just what rule prevails in Illinois. See *Sprague v. Bank*, 172 Ill. 149 (50 N. E. Rep. 19, 42 L. R. A. 606). But the supreme court of the United States has never departed from the prin-

Not officially reported.—Reporter.

ciples of *Sawyer v. Hoag*, and other like cases. See *Camden v. Stuart*, 144 U. S. 104 (12 Sup. Ct. Rep. 585, 36 L. Ed. 363. Nothing further need be said regarding the attitude of the various courts of the country on these propositions. Some of the cases cited may not clearly fall to the places assigned them, but on the whole, we think this as fair a classification of the authorities as can be made. In view of our previous holdings, this discussion may seem unnecessary; but, as counsel seem to think that the question is new to this court, we have attempted to state in brief some of the holdings in other jurisdictions.

We think our previous cases adopt the true-value rule,—perhaps not to its full extent; but such has been the drift of these cases. In *Osgood v. King*, 42 Iowa, 478, we said:

3 “Every principle of honesty and justice demands that, as between the stockholder and the creditor, the stock shall be considered paid only to the extent of the fair value of the property conveyed, and that for the balance the stockholder shall be held individually liable.” In *Jackson v. Traer*, 64 Iowa, 477, quoting from Taylor on Corporations, we said: “If the property secured is grossly unequal in value to the par value of the shares, the subscriber who secured the shares originally, or his subsequent transferee with notice of the circumstances, may be compelled to make up the difference in value.” In *Chisholm v. Forny*, 65 Iowa, 333, Seevers, J., speaking for the court, said: “Persons dealing with the corporation had the right to assume that it owned valuable assets to the amount of its capital stock; that is to say, that, in consideration for the stock issued, the corporation had received money or property which would be available to pay an indebtedness incurred in its business. A patent is, as has been said, a property in a notion, and has no corporal, tangible substance, and cannot be levied on and sold under execution issuing from

state courts; and whether it can be sold on executions issuing from the federal courts is regarded as doubtful. Until its usefulness has been established, the value of a patent right is purely speculative." Judge Robinson, in *Wishard v. Hansen*, 99 Iowa, 307, uses this language: "Where the capital stock of a corporation is issued to one of its promoters and organizers for property which is taken at a gross overvaluation, the transaction is fraudulent against creditors of the corporation, if it be insolvent; and the stockholder who receives such stock with knowledge * * * will be liable to creditors, on the stock he holds, for the difference between the par value * * * and the amount actually paid." In *Stout v. Hubbell*, 104 Iowa, 499, it is said. "It is alleged * * * that the land was given and received under an agreement that it was a full payment for the stock. This alone, would, be no defense; for this court has held, as to creditors of a corporation, that, when property is received by the corporation at an excessive valuation in payment for shares of its capital stock, it is only a payment to the extent of the value of the property received, and the owner of such stock is liable to creditors for the difference between the actual value of the property and the face value of the stock." In *Carbon Co. v. Mills*, 78 Iowa, 465, we again quoted with approval the rule announced by Mr. Taylor in his work on Corporations, and said that no plea of fraud was necessary. From this review it is apparent that we have, in effect, adopted the true-value rule, although saying in some cases that the reason for so doing was to prevent fraud. There is nothing in these decisions or in the statutes that inhibits the taking of property in exchange for stock, providing it is taken at its true value; and this value we do not think should in all instances, if in any, be measured by results. The parties have the right in good faith to agree on the value of the property taken, but this should not be a speculative or fictitious one. An honest mistake in judgment will not necessarily destroy the value agreed upon, but it must be such

a valuation as prudent and sensible business men would approve. Values based on visionary or speculative hopes, unwarranted by existing conditions or facts, and without reasonable evidence from present appearances, are not such as the law will tolerate, as against creditors. It is apparent that the patent and property sold the corporation by Porter *et al.*, had no such value as the parties placed upon it. The valuation was wholly speculative, visionary, and imaginary, as experience has shown. Indeed, we doubt if the parties thought it had any such value as they fixed upon it. They say they hoped and believed the company would realize therefor and thereon more than ninety thousand dollars, but no one had the temerity to say that he regarded the patent and property as of that value. The actual value received was but little over five hundred dollars.

But it is said that, as plaintiff's assignor had full knowledge and notice of all the facts, plaintiff cannot recover. This contention requires a little further examination of the rationale of the trust-fund doctrine. Consideration of the cases will show that it grew out of a desire on the part of courts to protect creditors who invested their funds on the faith that the capital stock was fully paid up, and represented the true assets of the corporation. Mr. Justice Miller, in *Sawyer v. Hoag, supra*, said: "We think it now well established that the capital stock of a corporation, especially its unpaid subscription, is a trust fund for the benefit of the general creditors of the corporation." He further said: "It is thought but just that when the interests of the people or of strangers dealing with this corporation are to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed, intentionally and inequitably, to screen the stockholder from loss, at the expense of the general creditors, it should be disregarded or annulled so far

as it may inequitably affect him." In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, this rule is announced: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. * * * The capital stock paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away." Justice Woods, in *Scovill v. Thayer*, 105 U. S. 143 (26 L. Ed. 968), says: "The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor, therefore, has the right to presume that the stock subscribed has been or will be paid up; and if it is not, a court of equity will, at his instance require it to be paid." In further explanation of the doctrine, Justice Brewer, speaking for the court in *Hollins v. Iron Co.*, 150 U. S. 371 (14 Sup. Ct. Rep. 127, 37 L. Ed. 1113), said: "Yet all that is meant by such expressions ["trust fund"] is the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, etc., has taken possession of its assets. It is never understood that there is a specific lien or a direct trust." Quoting from Pomeroy's Equity, he further says: "They are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor." He further likens a creditor's rights in such a case to the rights of a creditor of a partnership. Justice Field, in *Fogg v. Blair*, 133 U. S. 534 (10 Sup. Ct. Rep. 338, 33 L. Ed. 721), also announced a similar doctrine. Justice Woods, in *Scovil v. Thayer*, gives some of the reasons for the rule; and he says, in substance, that if a corporation sells its stock, as fully paid, for a discount, it cannot thereafter make calls for the purpose of increasing its business. "The shares were issued as full paid, on a fair understanding, and that bound the com-

pany. * * * But the doctrine of this court is that such a contract, though binding on the company, is a fraud, in law, on its creditors, which they could set aside; that when their rights intervene, and to satisfy their claims, the stockholders could be required to pay their stock in full." Following this doctrine to its logical conclusion, it was held in *Bank v. Alden*, 129 U. S. 372 (9 Sup. Ct. Rep. 332, 32 L. Ed. 725), that, where the creditor has full knowledge of the transaction between the corporation and its stockholder at the time he extends credit, he cannot be heard to complain for the reason that no credit is given upon a representation of a different set of facts than those which actually existed. See, also, *Coit v. Amalgamating Co.*, 119 U. S. 343 (7 Sup. Ct. Rep. 231, 30 L. Ed. 420); *Walburn v. Chenault*, 43 Kan. Sup. 352 (23 Pac. Rep. 657); *Whitehill v. Jacobs*, 75 Wis. 474 (44 N. W. Rep. 630); *Young v. Iron Co.*, 65 Mich. 111 (31 N. W. Rep. 814); *Woolfolk v. January*, 131 Mo. Sup. 620 (33 S. W. Rep. 432); *Manufacturing Co. v. Wallace*, 16 Wash. 614 (48 Pac. Rep. 415); *Robinson v. Bidwell*, 22 Cal. 379; *First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327 (44 N. W. Rep. 198, 6 L. R. A. 676). Indeed, we find no case to the contrary, unless it be *Sprague v. Bank*, 172 Ill. 149 (50 N. E. Rep. 19, 42 L. R. A. 606). That decision was based on a statute, however, which is somewhat different from ours, in that it made each stockholder liable for the debts of the corporation to the extent of the amount that may be unpaid on the stock held by him. Our statute says that nothing in the chapter contained, and nothing in the articles of incorporation, shall relieve the stockholders from individual liability, etc. (Code, section 1631); leaving the liability to be determined under the general law. *Light Co. v. Child*, 68 Conn. 522 (37 Atl. Rep. 391), relied on by appellant, is not in point. There the statute imposed a liability on the stockholder to the extent of twenty-five per cent. of the amount of stock held by

him. We have heretofore recognized these rules. While saying *argundo* that a sale of stock at a less rate than that fixed in the charter is a fraud upon the law and the stockholders (*Oliphant v. Mining Co.*, 63 Iowa, 332, yet in *Goff v. Windmill Co.*, 62 Iowa, 691), we further said: "The public has the right to assume, when the stock of a company has been issued as full-paid stock, that it has been paid for in money, or in property at a fair value. * * * If it has not been paid, * * * while this might be ground for a proceeding in the interest of the public to wind up the company, it is not ground on which the plaintiff can predicate his right to relief; * * * and, besides, he not only knew upon what basis the stock had been subscribed and paid for, but he subscribed and paid for his stock on the same basis." This, it will be observed, was also *dictum*. But in *Callanan v. Windsor*, 78 Iowa, 193, we held, in effect, that the assignee of a creditor of a corporation could not recover unpaid subscriptions to capital stock where the creditor knew when he extended credit that the stock, although issued as fully paid, had not in fact been so paid. Referring to the statute (Code 1873, section 1082), which is the same as section 1631 of the present Code, we said: "We are aware of the provisions of section 1082 of the Code. The primary object of those provisions was to protect creditors of the company. They should not be held to apply to a case of this kind, where, by virtue of a valid agreement, to which the original creditor was a party, nothing was due or collectible on the stock of the stockholder." In that case we approved the doctrine of *Scovill v. Thayer* and *Robinson v. Bidwell*, *supra*. In *Stout v. Hubbell*, *supra*, the same rule is recognized and applied; but, as plaintiff in that case had no notice, he was permitted to recover. See, also, *Clark v. Coal Co.*, 86 Iowa, 436. As the Commercial Loan Association had full knowledge of all the facts relating to the issuance and payment for the stock owned by the defendant, it could not recover. Does plaintiff, its trans-

feree after maturity, have any greater rights? We think not. Our statute (Code, section 3461) provides that "the assignment of a thing in action shall be without prejudice to any * * * defense * * * existing in favor of the defendant and against the assignor before notice of the assignment." But in *Richards v. Daily*, 34 Iowa, 427, we said the holder of a negotiable note transferred after maturity takes it subject to all equities arising out of the note itself, such as payment, etc., but not subject to an independent set-off, and that the section just quoted did not change the rule. Indeed, it is elementary doctrine that a transferee of overdue negotiable paper takes it liable to all equities to which it was subject in the hands of the payee. But those equities must attach to the paper itself, and not arise from any collateral transaction. *Young Men's Christian Ass'n Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. Sup. 599 (54 N. E. Rep. 297); *Gibson v. McIntyre*, 110 Iowa, 417. This rule has no application to the case at bar: The maker of the note (the corporation) is interposing no defense. Plaintiff had judgment on the note without defense on the part of the maker. Its present action is not on the note, but is an attempt to collect its judgment against a stockholder of the corporation. The law merchant has nothing to do with such a case. It is a mere right or chose in action incident to ownership of the note, acquired in virtue of a transfer thereof, and plaintiff has no other or greater rights with respect to defendant's liability than its assignor had at the time of the assignment. If defendant was in any sense a party to the note, then he might interpose any defense he held against plaintiff's assignor. But, if not a party, then his liability to plaintiff exists by reason of the assignment and transfer of the note. If a mere chose in action against defendant was transferred, then, under the statute, plaintiff has no greater rights than its assignor. In *Callanan v. Windsor*, *supra*, plaintiff was the assignee of the original creditor, and it was held that he had no greater rights than his assignor. That

case is determinative of several of the questions presented by this record.

We have already said more, perhaps, than the case warrants; but as the questions are important, and the authorities are conflicting, we have attempted to lay down rules that may be followed in this class of actions, that are becoming more frequent in this age of corporations. Our conclusion is that the judgment of the trial court should be, and it is, **AFFIRMED.**

111	677
131	280
111	677
136	655

LORETTA SHROPSHIRE, Appellant, v. D. RYAN.

Trust Relation: FAIR DEALINGS: *Burden of proof.* Plaintiff assigned a claim in suit to defendant, who contracted to deed property to her; it being provided that out of the balance of the amount
1 collected a fee should be paid to plaintiff's attorney, and cer-
4 tain debts of her husband settled. Four years thereafter a
5 supplementary contract was executed, authorizing defendant
and his law firm, which did not exist at the time of the assign-
7 ment, to apply the proceeds of such claim to all claims held
by them against plaintiff or her husband, and providing for
8 a personal attorney's fee for defendant. There was no new
consideration, and it is not shown that plaintiff had knowledge
as to the claims against her husband. Afterwards, the original
contract was cancelled, and all demands between defendant
and his law firm and plaintiff and her husband settled. No
written statements of charges and disbursements was ever
given to plaintiff, and her testimony showed that there was
no open and full accounting. At the time of the supplementary
contract and settlement defendant was plaintiff's attorney, em-
ployed in collecting the claim assigned to him in trust for
plaintiff. *Held*, that there was not sufficient proof to overcome
the presumption of fraud as to the supplementary contract,
arising from the trust relation existing between the parties.

PAYMENT AS SURETY: *Evidence.* Where, on accounting, defendant,
attorney, testified that a certain amount was figured as the
amount for which he and his partner were held liable as sure-
ties, but did not testify such amount was paid, though he said
10 he made payments and had taken receipts, and that another
amount was paid on account of a defalcation of plaintiff, of

which he offered no other proof nor showed to whom it was paid, the evidence was insufficient to establish such claim.

ALLOWANCE ON ACCOUNTING. Where receipts filed show certain moneys refunded by defendant attorney on account of plaintiff
10 as administratrix, such moneys will be allowed to him on accounting.

Estoppel: CONSISTENCY: *Specific performance and annulment of contract.* Where plaintiff prayed for specific performance of a contract, thereby adopting the same, and asserting rights thereunder, and nowhere in her pleadings, intimated that such
6 contract was invalid, she is estopped to claim that such contract is void because of a confidential relation existing between the parties thereto.

Appeal: OBJECTIONS TO CERTIFICATION: *Must be specific.* An objection to the certification of a record by the trial judge, which
2 does not point out its insufficiency, will not be considered on appeal.

DEFECT IN PLEADING: *Waiver on first submission.* Where a petition prayed for specific performance and general relief, and the answer alleged an accounting and cancellation of the contract, which cancellation was admitted and accounting denied by the
3 reply, and the case was tried on the theory of a full accounting, and on a first submission defendant raised no question of the sufficiency of the pleadings to warrant an accounting, but denied the accuracy thereof, such defendant is estopped on a second submission of the same appeal to question the sufficiency of the pleadings to justify an accounting.

Appeal from Jasper District Court.—HON. A. R. DEWEY,
Judge.

THURSDAY, MAY 24, 1900.

THE plaintiff, in her petition, alleges that on the sixth day of January, 1886, the defendant entered into a written contract to convey her certain real premises in consideration of her assignment to him of a claim of some thirteen thousand dollars against one John Lyle. In her prayer she asks for a specific performance of this contract, "and for such other and further relief as equity and good conscience should
1 give in the premises." The answer admits the making of the contract in substance as alleged by the plaintiff, and avers that it related to certain liti-

gation then pending in the supreme court of the United States, and that preceding this litigation, and on the fifteenth day of February, 1890, a certain other contract in writing was entered into between the plaintiff and her husband, A. C. Shropshire, and the defendant, and that subsequent to the execution of the two contracts, and after a final determination of the litigation referred to, there was, on the sixth day of November, 1893, a full and complete accounting between this defendant and the plaintiff, in which the contract of January 6, 1886, was canceled in writing, and a full receipt given the defendant by this plaintiff and A. C. Shropshire, in words as follows: "Newton, Iowa, Nov. 6, 1893. Received of D. Ryan this day the sum of nine hundred dollars, in full of all demands to this date, and in full settlement of all matters between him and Ryan Bros. and ourselves. [Signed] A. C. Shropshire. Loretta Shropshire." In reply to this answer plaintiff admits that the cancellation on the margin of the contract was signed by her, and says that it was without consideration, and was procured by fraud on the part of the defendant. She denies an accounting, or that any sum was determined upon as due her as a result thereof, and alleges that her signature to said receipt was procured by the defendant through his false and fraudulent representations. Plaintiff also charges that the alleged instrument of February 15, 1890, is fraudulent and void. There was a trial to the court, and judgment for the defendant. The plaintiff appeals.—*Reversed.*

Young, Gorrell & Rhinehart and *C. C. Cole* for appellant.

Wm. Phillips, Robert Ryan and *W. O. McElroy* for appellee.

SHERWIN, J.—Upon the original submission of this cause it was affirmed by reason of a divided court, and no

opinion was written. The defendant, in argument, claims that the record is not properly certified by the trial
2 judge, and that for this reason we cannot consider the case *de novo*, but does not point out wherein it is insufficient, and hence we pass this point. It is now urged that the pleadings are insufficient to warrant an accounting between the plaintiff and the defendant. Whatever
3 doubt there may be as to this matter is rendered immaterial for the reason that the case was tried in the court below on the theory of a full accounting, as well as on the claim for a specific performance, and no question of this kind was raised or referred to in its former presentation to us. Indeed, the burden of defendant's argument was on the question of the full, accurate, and just accounting made upon the trial, and it is now too late to say that the pleadings did not justify it. It is not contended by the appellant that specific performance of the contract sued on should have been decreed, and we turn our attention to the one controlling question in this case,—that of the accounting between plaintiff and defendant. On the sixth day
4 of January, 1886, the plaintiff was the owner of a certain claim against one John Lyle, which was then in suit in the United States district court in Des Moines, and on that day she assigned all right and title thereto, and to any judgment recovered thereon, to this defendant. At the same time the defendant executed to her a written agreement, which recites the assignment of the Lyle claim to him, and in consideration thereof promises, when the claim is collected, to deed to the plaintiff his homestead in Newton, and provides that the balance of the amount collected shall be applied as follows: "One thousand dollars as atty.'s fees in said case, to be paid to plaintiff's attys." "The sum of money due from me to my sureties as admx. of estate J. S. Long." "Any remainder to be in full of all other accounts between said Ryan and Loretta Shropshire and A. C. Shropshire." We set out this much of that contract to enable a

better understanding of what follows. It is all that is pertinent to the issue before us. The contract of February 15, 1890, referred to in the statement of the case, is claimed by appellee to be supplemental to that of January 6, 1886. It provides that D. Ryan and Ryan Bros. shall receive from the collection of the Lyle claim "all sums of money now due or owing them or either of them, whether in note or due on book account, * * * and this shall include any sums due from Loretta Shropshire to the sureties on her bond as admx. of estate of J. S. Long; and it is further agreed that D. Ryan shall receive as his personal atty.'s fees in recovering said judgment vs. John Lyle sixteen (16) per cent. of the same when collected." The defendant is an attorney, and the relation of attorney and client had existed between plaintiff and him for a number of years prior to the transactions before us. The Lyle claim was placed in his hands for collection by the plaintiff, and suit brought thereon

by him in Jasper county in 1883, and from there
5 it was removed to the federal court in Des Moines.

It also appears beyond question that the assignment of the Lyle claim to him was really in trust for the plaintiff, so that he sustained the dual relation to the plaintiff of
6 trusted counsel and trustee of her property. Because

of this confidential relation, the plaintiff now asserts
that the contract sued on and the one set out in the answer are both void. The former has been adopted by the plaintiff, and her right to certain land is asserted thereunder. Nowhere in her pleadings has she intimated that it is a contract which should not be recognized, and she cannot now sustain such claim. That the relations existing between these parties required the utmost fairness and good faith on the part of the defendant is elementary, and conceded by the defendant. The confidence reposed in the attorney by the client, or in the trustee by the *cestui que* trust, is so carefully guarded by the law that it places the burden of proving the entire fairness of the pecuniary transactions between them

upon the attorney or trustee; and where a contract is entered into between them it is presumed to be fraudulent. *Ryan v. Ashton*, 42 Iowa, 365; *Leighton v. Orr*, 44 Iowa, 679; Pollock's Contracts 525; 3 Greenleaf on Evidence (13th ed.), section 253. Under this rule the burden is upon the defendant to prove the validity of the supplemental contract of February 15, 1890, and also the validity of the final settlement of November 6, 1893.

We have read and re-read the entire evidence in this case as presented by the reporter's transcript thereof, and reach the conclusion that neither the contract of February 15, 1890, nor the settlement of November 6, 1893, can be upheld. This supplemental contract, as it is termed by the defendant, enlarges the original one in these respects. In the first place, it gives the defendant authority to apply the proceeds of the Lyle claim to the payment of any and all claims held by D. Ryan, or by Ryan Bros., against either the plaintiff or her husband, whether in note or due on book account. In the second place, it provides a personal attorney's fee for the defendant of 16 per cent. on the amount collected. It appears from the record that A. C. Shropshire was the second husband of the plaintiff, and it does not appear that he owned any interest in the Lyle claim. At the time the assignment of this claim was made to D. Ryan, no such firm as Ryan Bros. was in existence, though previous thereto a law partnership under that name had been carried on by the defendant and his brother. A. C. Shropshire owed this firm on book account, and owed the defendant both on book account and on notes, according to the defendant's testimony; but no legal or moral liability of the plaintiff to pay his debts either to D. Ryan or to Ryan Bros. is shown, except as provided for in the contract of January 6, 1886. No consideration is proven to have passed for this greatly enlarged liability of the plaintiff, amounting to nearly three thousand dollars. True, she admits that her signature is

attached to the paper, but this is not enough. The defendant must prove the *bona fides* of this transaction, and a
8 sufficient consideration for the contract. He does not claim a new consideration entered into it, nor is it made to appear that the plaintiff knew or was advised as to the amount or character of the claims held against A. C. Shropshire, with which defendant proposed to charge her. The proof fails to show a contract that should be sustained. The settlement of November 6, 1893, and the cancellation of the 1886 contract must be held for naught for the same reasons applying to the contract. There is a decided conflict in the testimony touching what transpired at that time. The defendant does not claim that a written statement of the charges against and disbursements of this fund was ever given to the plaintiff, or that she ever had an opportunity to examine his books relative thereto. The most that is claimed is that he read over the items, and explained them to the plaintiff, and told her that nothing was due her out of the five thousand three hundred dollars collected on the Lyle claim. This claim had been in litigation for many years, and involved a considerable sum of money. When a settlement was finally made with the plaintiff, she should have been advised in the most detailed manner of the charges against the fund. That such information was not furnished her, is apparent from the condition of the record before us. No statement is attached to the pleadings showing items of account charged to her or to A. C. Shropshire, nor are the books or transcripts therefrom here for our examination, and even the evidence to sustain many of the charges alleged to exist is uncertain and vague. In addition to this, we have the plaintiff's testimony as to what took place at the time. It is sufficient to say that we cannot disregard this, and that it is against an open and full accounting.

It is somewhat difficult to determine just what credits the defendant should be allowed. The burden still rests with him to fairly establish his claims against the plaintiff which

are not conceded. It is conceded by the plaintiff that he is entitled to credit for one thousand two hundred dollars attorney's fee paid Phillips & Day, five hundred and thirty-one dollars and fifteen cents paid in settlement of the Quin-ton garnishment, and for nine hundred dollars paid at the November, 1893, settlement. Under the 1886 contract, an attorney's fee of one thousand dollars was provided for, which, we think, was intended to be in full for the service of attorneys in prosecuting the case, and we think the conclusion may be fairly drawn from the evidence as a whole that it was then thought that this sum would be about ten per cent. of the final amount collected on the Lyle claim. Notwithstanding the fact that a fee of one thousand two hundred dollars was paid to Phillips & Day, we think the defendant should be allowed ten per cent. on the five thousand three hundred dollars finally collected, thus giving him five hundred and thirty dollars for his services in the case. It does not appear that he took an active part therein after it went to the federal court, and this is, we think, a fair allowance under the evidence.

On his direct examination the defendant testified that at the time of the November, 1893, settlement A. C. Shropshire owed him on book account six hundred and twenty dollars. On his cross-examination he said there was due him on book account from A. C. Shropshire at that time a balance of one hundred and eight dollars. It is impossible for us to tell which sum is correct, and hence we credit him with one hundred and eight dollars, which we think should be allowed under the contract of 1886. It may be that the defendant had an account against the plaintiff for six hundred and twenty dollars in his mind when he testified as above, for, later on, in speaking of an account of six hundred and twenty dollars and eighty-two cents against the plaintiff, he says it is the one he had referred to before. We

9 find it proven that the defendant refunded to A. L. Dalrymple, John Morrison, W. H. Langan, and R.

Johnston one hundred dollars each on account of plaintiff as administratrix of the J. S. Long estate. Two of these witnesses testify that the money they advanced was to pay costs in the Lyle case, but the receipts filed show differently, and we conclude they were mistaken in the matter. We find but two of the receipts offered in evidence, but the others accompany the exhibits in the case, and are supported by testi-

mony, so we consider them as in evidence. The testi-
10 mony as to payments to other sureties and as to payments as sureties by Ryan Bros. is altogether too

indefinite and unsatisfactory to rely upon. In his testimony the defendant says that one thousand two hundred and thirty-six dollars and forty-five cents was figured in at the time of the settlement for which Ryan Bros. were held liable. He does not say there that any such amount had been paid. He, in another place, says he was anxious to protect the sureties, and did pay them back, and took receipts. He also claims that the balance of this money was paid on account of the defalcation of plaintiff as administratrix, but no other proof thereof is offered, nor is it shown to whom one dollar of it was paid. Surely, it would have been an easy matter for the defendant to put the question at rest by the evidence within his reach. If the condition was such as claimed, he ought at least to have shown to whom, when, and in what amounts these other payments were made. Having failed to make his proof on this question as complete as he ought, we cannot allow the credit claimed. It is claimed by defendant that a book account of six hundred and fifty-seven dollars was due Ryan Bros., but from whom does not appear, though an inference may be drawn from the defendant's testimony that it was the debt of A. C. Shropshire, for on cross-examination he says, in substance, that all he had charged to the plaintiff was the one thousand two hundred and thirty-six dollars due the sureties. If it was the debt of the husband, plaintiff could not be charged with it, as we have heretofore said.

The foregoing items and amounts are all, we think, the evidence justifies us in allowing the defendant credit for. The total principal amounts to three thousand six hundred and sixty-nine dollars and fifteen cents. To this we add, as have counsel in making their computations, interest on the entire sum, except the four hundred dollars paid the sureties, for the term of six years, two months, and twenty-nine days, to February 1, 1900. On the four hundred dollars, which the receipts show was paid February 24, 1894, we allow interest also to February 1, 1900; making the total interest credit one thousand three hundred and sixty-seven dollars and five cents. Total amount, principal and interest, five thousand thirty-six dollars and twenty cents.

It is urged that the defendant should be charged with four hundred dollars and the interest thereon collected on the Chamberlain matter, but we think the evidence does not support this claim. We therefore disregard it. The amount then, with which the defendant should be charged is the five thousand three hundred dollars collected on the Lyle claim, with interest on three thousand dollars for six years, two months, and twenty-nine days, and on two thousand three hundred dollars for five years, eleven months, and nine days, which makes a total charge of seven thousand two hundred and forty-four dollars and forty-five cents. Deducting from this the amount of credit allowed leaves a balance due the plaintiff of two thousand two hundred and eight dollars and twenty-five cents, for which sum she may have judgment in this court, with interest from February 1, 1900. The judgment of the district court is **REVERSED**.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA
AT
DES MOINES, OCTOBER TERM, A. D. 1900.
AND IN THE FIFTY-FOURTH YEAR OF THE STATE.

STATE OF IOWA v. IRWIN CHAUVET, Appellant.

111 687
115 119

Keeping House of Ill Fame: The keeping of a covered wagon, drawn from place to place and used as a place of abode for
2 human beings for the purpose of prostitution, is within the statute prohibiting the keeping of a house of ill-fame.

Corroboration of Accomplice: Evidence of an accomplice of a defendant charged with keeping a house of ill fame, which con-
1 sisted in the use of a covered wagon, in which prostitution was carried on, is sufficiently corroborated by defendant's apparent control of the wagon and team, supported by his admissions.

Appeal from Sac District Court.—HON. S. M. ELWOOD,
Judge.

(687)

TUESDAY, OCTOBER 2, 1900.

DEFENDANT was convicted of keeping a house of ill fame, and appeals.—*Affirmed.*

C. R. Metcalf for appellant.

Milton Remley, Attorney General, and *Charles A. Van Vleck*, Assistant Attorney General, for the State.

SHERWIN, J.—The defendant was convicted of keeping a house of ill fame, which consisted in the use of a covered wagon, with which he traveled from place to place, and in which prostitution was carried on. The principal witness for the state was a young woman who testified that she was engaged to go with the defendant in a wagon furnished by him, for the purpose of sexual commerce for hire throughout the country, and that she did very frequently indulge therein in the wagon in question, with the knowledge and at the solicitation of the defendant, and that the wages of her sin were given over to the defendant. The defendant insists that this witness was an accomplice, within the meaning of the law, and that her evidence as to his keeping the wagon is not sufficiently corroborated. It may well be doubted whether this position is tenable, but, if it is, the evidence in corroboration is ample. His admission, and his apparent control of the wagon and team, authorized the jury to find as it did, for they tended to connect him with the commission of the offense, and this is all the statute requires. *State v. French*, 96 Iowa, 255.

The defendant contends that the keeping of a covered wagon for the purpose of prostitution and lewdness cannot

be brought within the statute prohibiting the keeping of a house of ill fame; that a structure, to constitute a
2 house, must be fixed in some particular locality, and be substantial and abiding. The statute does not say that these conditions shall exist, or define what shall be considered a house, within its meaning. That houses may be built of stone, brick, wood, iron, glass, or any other material, or combination thereof, which may suit the fancy of the builder, cannot, we opine, be successfully controverted. If this be true, then it may be built of such materials as are commonly used in the construction of wagons and the covers thereto. Nor are we aware of any fixed and definite size or shape necessary to create a house in legal contemplation. The Century Dictionary defines a house as "an abiding place; an abode; a place or means of lodgment." The evidence shows this wagon to have been fixed up with a black cover,—likely to correspond with the shades of night. It had a curtain in front, which was dropped when occasion required the concealment of the harlot and her lascivious visitor. In it alone the defendant and his companion in sin abode and found lodgment and shelter for several weeks prior to his arrest. If a stone house were being moved from one point to another in the same city or town, or from one town to another, as has been done, and during the time of such moving it was used for purposes of prostitution, could it be held that the mere fact of its being on wheels destroyed its character? We think not. If used as a place of abode for human beings, it would still be a house. The boat which floats for months each year upon some beautiful sheet of water, and carries the entire family and numerous friends of its opulent owner, is denominated a "house boat." And why? Because it is the temporary abiding place of its occupants, and answers the purpose, for the time being, of the most expensive and stationary palace. In *State v. Mullen*, 35 Iowa, 207, it was held that a boat on the Mississippi river

was a house of ill fame, within the meaning of the statute. It does no violence to the statute nor to sound reason to hold that a wagon, under the conditions shown in this record, is also within the contemplation thereof. The judgment is AFFIRMED.

GRANGER, C. J., not sitting.

111 690
f132 198
f133 745

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f140 665

THE STATE OF IOWA v. WILLIAM KISSOCK, Appellant.

Seduction; CORROBORATION. Where defendant had not known the prosecutrix prior to the night of the alleged seduction, and
1 never met her but twice afterwards, evidence that he accompanied her to her home from a dance on that night, a distance
2 of six or seven miles, and stated to others before leaving that he "would take the girl home and get his work in then," was not sufficient corroboration to support an indictment for seduction.

SAME. In a prosecution for seduction, the birth of a child to the
4 prosecutrix, as a result of the alleged illicit intercourse, is not corroborative evidence of the alleged seduction.

Sufficiency—Jury question. The sufficiency of the corroborative
5 evidence offered in a prosecution for seduction is a question for the jury.

INSTRUCTIONS: Applicability to evidence. Where defendant had not known the prosecutrix prior to the night of the alleged seduction, and there was no evidence that he was frequently
3 with her, or had made any admissions as to the alleged paternity of her child, an instruction that the corroboration required by law may be shown in a variety of ways, such as that the defendant was keeping company with the prosecutrix or was frequently with her, or that a child was born, or by admissions of defendant tending to establish the alleged intimacy or paternity of the child, was erroneous, as not supported by the evidence.

Exclusion of Witness: VIOLATING ORDER OF EXCLUSION: Right to recall witness. Where, under order of court, witnesses were excluded from the court room, the fact that, after examination,
6 a witness remained in the room did not justify denial of permission to recall him.

Appeal from Jasper District Court.—HON. JOHN T. SCOTT,
Judge.

TUESDAY, OCTOBER 2, 1900.

INDICTMENT for seduction. Verdict and judgment of guilty, and defendant appeals.—*Reversed.*

Harrah & Myers for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

DEEMER, J.—The prosecutrix claims that she met the defendant at a dance on or about October 14, 1898, pursuant to his request, and that he took her from the place where the dance was held to her own home, which was six or seven miles distant; that, although she had never
1 been in his company before, defendant not only proposed marriage to her within a short time after they left the dance, but that he unlawfully seduced her while on the road home. It is not claimed that defendant kept company with the prosecutrix prior to this time, and the evidence tends to show that he was with her but twice after that. On July 10, 1899, prosecutrix gave birth to a child, which she claims is the result of her illicit intercourse with defendant. Defendant denies the intercourse and the paternity of the child. If there is anything well settled, it is that mere proof of acquaintance and opportunity does not constitute the corroboration required in this class of cases. Defendant was not the suitor of the prosecutrix. He had never been with her prior to the night of the alleged seduction. He
2 was with her, if at all, but twice after that. There is, however, some evidence to the effect that defendant said while at the dance, and before leaving to take the prosecutrix home, that “he would take the girl home and

get his work in then." The court gave the jury the following instruction bearing on the question of corroboration:

3 "This corroboration, however, may be shown in a
variety of ways; such as that defendant was keeping
her company; that he was frequently with her; that a
child was born, the result of the illicit intercourse charged;
by admissions of the defendant tending to establish the al-
leged intimacy, as well as the paternity of the child, and
connecting the defendant with such paternity, or in any
other way which satisfies the mind that defendant is guilty
as charged. This evidence, however, must be given by other
witnesses than the prosecutrix herself, except to the acts
of sexual intercourse and the seductive arts used and the
promises made use of by the defendant. If, therefore, you
find that corroborating evidence has been offered by the
state, and is of the character indicated, and tends to connect
the defendant with the commission of the crime charged,
then the corroboration is sufficient." This instruction is
manifestly erroneous. There is no evidence that defendant
was keeping company with prosecutrix prior to the alleged
seduction; no evidence that he was frequently with her; no
evidence of admissions of defendant of the alleged
4 intimacy or of the paternity of the child. More-
over, we have recently held, following an early case,
that birth of a child as a result of illicit intercourse is not
corroborative evidence of the alleged seduction. *State*
5 *v. McGinn*, 109 Iowa, 675. Again, it was for the
jury to determine whether the corroborative evidence
was sufficient. *State v. Bess*, 109 Iowa, 675, and cases cited.

II. Under rule of court the witnesses were excluded
from the court room during the trial of the case. One
Holdsworth was called as a witness for defendant, and, after
being examined and cross-examined, was excused.
6 After leaving the witness stand he remained in the
court room during the further progress of the trial.
Defendant recalled the witness for further examination. The

court on its own motion refused to permit his evidence to be received because he had remained in the court room after being excused. In this there was error. Under certain circumstances the witness might have been punished for contempt, but the mere fact that he remained in the room contrary to the previous order did not justify the court in denying permission to recall and re-examine the witness.

III. There is no evidence that the parties kept company before the evening on which the alleged seduction occurred, and, at most, defendant was with the prosecutrix but twice after that. All that can be said of the so-called "corroborating evidence" is that it showed opportunity for defendant to commit the crime. That this is not enough is held in numerous cases. *State v. Painter*, 50 Iowa, 317; *State v. Tulley*, 18 Iowa, 89; *State v. Burns*, 110 Iowa, 745. For the errors pointed out the judgment is REVERSED.

GRANGER, C. J., not sitting.

KELLY & MAHON, Appellants, v. CELESTINE FEJERVARY, as
Executrix of N. FEJERVARY, Deceased.

111	693
137	100

111	693
138	125

Building Contract: LIQUIDATED DAMAGES AND PENALTY: *Burden of proof.* Where a building contract, providing that in case of
1 delay the contractor shall pay to the owner ten dollars per day for every day after that named for the completion of the work "as liquidated damages," contained no provision from which it could be determined whether the parties intended such sum to be liquidated damages or a penalty, the usual technical meaning of such term will be applied to it, in the absence of a contrary showing; the burden being on the contractor, in an action to recover the amount retained by the owner under such clause, to show that the same was a penalty.

EVIDENCE: *Construction of Contract.* Where a building contract provided that in case of delay the contractor should pay a certain amount for each day's delay as liquidated damages, but contained nothing from which it could be determined as to whether the sum to be retained was intended by the parties

- 3 as liquidated damages or as a penalty, evidence of conversations had at the time and just previous to the execution of a contract between the parties and their agents was not inadmissible as tending to contradict the written instrument, for, such evidence did not tend to contradict the instrument, but merely to explain what was intended by the expression "liquidated damages."

Is JURY QUESTION. Where, in an action to recover damages retained for delay in completing a building under a clause of the contract providing for liquidated damages, the evidence puts in
5 issue the intention of the parties in using such clause, the question of the parties' intention is for the jury, and not for the determination of the court.

CONSTRUCTION ON APPEAL. Where a building was erected under a trust agreement, and the record on appeal, in an action to recover money retained as liquidated damages for delay, contained no showing as to the terms of the trust, except a state-
2 ment by one witness that the building was erected as "an old men's home," the supreme court cannot determine the bearing which the trust and its provisions had on the issue whether the amount retained was intended by the parties as liquidated damages or a penalty.

Pleading: STRICKEN OFF. In an action to recover money retained for delay in completing a building contract, a reply, denying a conversation with defendant's intestate tending to show
4 an intention to treat a provision in the written contract relating to damages for such delay as a penalty and not liquidated damages, was properly stricken from the files, as pleading evidence.

EFFECT ON EVIDENCE. Where, in an action to recover money retained as damages for delay in completing a building contract, a reply, denying that plaintiff had any conversation with defendant's intestate relating to whether or not such damages
4 were intended as a penalty, had been stricken from the files as pleading evidence, such reply was no ground for excluding evidence of such conversations at the trial, because a pleading stricken before trial cannot control the taking of testimony.

Appeal from Scott District Court.—HON. A. J. HOUSE,
Judge.

TUESDAY, OCTOBER 2, 1900.

THE plaintiffs entered into a contract April 15, 1892, with N. Ferjervary, by the terms of which they agreed to construct a certain building before October 15th of that year. They failed to complete it until some time in February, 1893, when the owner withheld from the contract price the sum of six hundred and sixty dollars as liquidated damages, for which recovery is sought in this action. Verdict and judgment for the defendant, and the plaintiffs appeal.—*Reversed.*

Cook & Dodge for appellee.

E. M. Sharon for appellants.

LADD, J.—That the building was not completed by the time stipulated, and no extension granted in the manner required, was fully established by the evidence, and the jury may well have fixed the period of delinquency at sixty-six days. The sixth paragraph of the contract provided that “the contractors shall and will proceed with the said work, and every part and detail thereof, in a prompt and diligent manner, and shall and will wholly finish the said work, according to the said drawings and specifications and this contract, on or before the 15th day of October, in the year one thousand eight hundred and ninety-two (provided that possession of the premises be given the contractors, and line and levels of the building furnished him, on or before the 25th day of April, in the year one thousand eight hundred and
1 ninety-two), and in default thereof the contractors shall pay to the owner ten (\$10) dollars for every day thereafter that the said work shall remain unfinished, as and for liquidated damages.” So that, if the stipulation for ten dollars per day be regarded as liquidated damages, the owner had the right to retain the six hundred and sixty dollars from the contract price. But the appellant insists that this should be construed as a penalty, and actual damages only allowed. It is often a matter of great perplexity to determine

whether a condition ought to be construed as ascertaining damages or merely as a penalty. Ordinarily, agreements are made to be performed, and the parties pay little heed to the contingency of a failure. For this reason, if the face of the instrument leaves it doubtful whether the parties intended the sum specified as liquidated damages or a penalty, the courts incline to treat it as a penalty to cover the actual damages only. Indeed, the fundamental principle underlying our system of jurisprudence is that of compensation, and the ultimate object is always, if possible, to put the injured party in as favorable a position as though the contract had been kept. "So long as the parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises as in any other contract made; and here, as in all other cases, their intention, as ascertained from the language employed, is a guide." 1 Sedgwick, Damages, section 406. Thus, if damages larger than the law permits are stipulated, as more than the legal rate of interest for the nonpayment of money, or a sum certain is specified as ascertained damages for the breach of any one of several stipulations when the losses resulting from such breaches must necessarily differ in amount, or an excessive sum is named in a case where the real damages are certain or readily reduced to a certainty by proof, the sum designated, under any of these conditions, is to be construed a penalty. But when damages are to result from the breach

of a single stipulation, and may not be readily ascertained, then the amount agreed upon by the parties, if not disproportionate to the presumable loss, is recoverable as liquidated damages. *Wallis Iron Works v. Monmouth Park Ass'n* (N. J. Err. & App.) 26 Atl. Rep. 140, 19 L. R. A. 456 (39 Am. St. Rep. 626); *Wilhelm v. Eaves*, 21 Or. 194 (27 Pac. Rep. 1053, 14 L. R. A. 297); *Tennessee Manufacturing Co. v. James*, 91 Tenn. Sup. 154 (18 S. W. Rep. 262, 15 L. R. A. 211); *Hennessy v. Metzger*, 152 Ill. 505 (38 N. E. Rep. 1058, 43 Am. St. Rep. 267); *Hall v. Crowley*, 81 Am. Dec. 745; *Condon v. Kemper*, 47 Kan. Sup. 126 (27 Pac. Rep. 829, 13 L. R. A. 671).

Courts are not even agreed that the intention of the parties is of controlling importance. Christiancy, J., in *Jaquith v. Hudson*, 5 Mich. 123, declared: "The attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked whether in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, a court of law would enforce it for the amount stipulated. Clearly, it could not, without going back to the technical and long-exploded doctrine, which gave the whole penalty of the bond, without reference to the damages actually sustained. Courts would thus be simply changing the names of things, and enforcing under the name of stipulated damages what in its own nature is but a penalty. The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While the courts of law gave the penalty of

the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages. It must, therefore, we think, be very obvious that the actual intention of the parties of this class of cases, and relating to this point, is wholly immaterial; and, though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not and cannot be made the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' " It would be difficult, indeed, to make a satisfactory response to this criticism, but it may be said that the difference lies largely in the use of words, and that whether or not the understanding of the parties be held to control the same result is uniformly attained. In *Sanford v. Bank*, 94 Iowa, 683, Deemer, J., stated the general rule, laid down in former decisions of this court: "In construing such contracts, the court will endeavor to ascertain the intention of the parties, and will give the forfeiture clause such effect as they intended it should have. The words used, whether 'forfeiture,' 'liquidated damages,' or 'penal sum' are not alone conclusive. Nor, indeed, is the language of the contract generally. The court will look to the nature of the contract, the situation of the parties, and to all the surrounding facts and circumstances which throw light upon the intent of the parties, for the purpose of determining what meaning they placed upon the words used." *De Graff, Vrieling & Co. v. Wickham*, 89 Iowa, 720; *Foley v. McKeegan*, 4 Iowa, 1. Thus, the circumstances mentioned by Justice Christiancy are taken into consideration in this state as pointing out the intention of the parties rather than as indicating none existed.

Though the use of a particular word will not be regarded as determinative, it may be remarked that, while the phrase "liquidated damages" is frequently declared to signify no more than a penalty, a sum expressly designated a penalty has rarely been construed to mean liquidated damages. Nothing in the contract before us indicates which was intended, save the words employed. The use of the proposed building is not disclosed therein. The seventh paragraph, in permitting the architect to extend the time on certain contingencies, if applied for in writing, and that if granted "the contractors shall be released from the payment of the stipulated damages for the additional time so certified," is no more definite than the sixth paragraph quoted. The twelfth paragraph relates solely to damages occasioned to the owner in furnishing unskilled labor or unsuitable material, or in finishing the building owing to the failure of the plaintiff on due notice, and has no relation to the delay in completing within the allotted time. It is peculiarly a case, then, for resort to extraneous evidence for aid in ascertaining the intention of the parties in the use of the term "liquidated damages." In the absence of any showing to the contrary, the usual technical meaning will be accorded this phrase, and the burden cast upon the plaintiff to show something else was really intended. *De Graff, Vrieling & Co. v. Wickham*, 89 Iowa, 726.

II. Undoubtedly proof of the use to which the building was to be put would have had an important bearing in ascertaining the intention of the parties. If solely for a charitable purpose, then it is quite likely not to have been suited to earning a profit, nor would it ordinarily be possible to estimate, with any degree of accuracy, the loss to that use. This, however, must depend somewhat on the character of the erection which was shown and the nature of the trust. One witness refers to the building as "the old men's home," and its transfer and that of a fund to trustees is mentioned, but beyond this the record

is silent. We may hope, but cannot assume, that its object is philanthropic, and it a monument to the benevolent spirit of its founder. But this has not been established by the evidence, and we cannot say, until advised of the nature of the trust, what bearing its conditions may have in fixing upon the understanding of the parties in making the stipulation with respect to damages.

III. Such clauses are treated in the books as somewhat in the nature of ambiguous expressions, and all evidence tending to disclose the true meaning of the parties received. For this purpose, the conversation relating thereto, had at the time or just previous to the execution of the contract between Kelly, acting for the plaintiff, and Fejervary or the architect, if then acting as his agent, as the evidence tended to show, should not have been excluded. The competency of the witness was not questioned. The object was not to attack the written instrument, but to explain what was intended by the use of the particular expression. True, in an amendment to a reply, stricken on motion, plaintiff averred Fejervary and plaintiff had no conversation. But that was no part of the pleadings at the time of the trial, and furnished no ground for the exclusion of the proffered testimony. And it may here be said that, as this amendment pleaded evidence, it was properly stricken.

IV. In view of another trial, it may be well also to add that, if the evidence adduced puts in issue the intention of the parties in using the clause of the contract relating to damages, it will be for the jury, rather than the court, to determine.—REVERSED.

GRANGER, C. J., not sitting. WATERMAN, J., takes no part.

THE STATE OF IOWA V. CHARLES SPIEGEL, Appellant.

Construction of Indictment: Code, section 4780, provides that if any person willfully and maliciously burn, either in the day or night time, the building of another, he shall be imprisoned, and section 4781 declares that, if any person set fire to any building with intent to cause such building to be burned, he shall be imprisoned. *Held*, an indictment which charged defendant with wilfully, feloniously, and maliciously setting fire and burning a certain store building then and there occupied as store, clearly charged the offense specified in section 4780, and was not open to the objection that it was impossible to determine under which of said two sections the crime was charged.

CROSS-EXAMINATION: *Timely objection.* Where, on cross-examination, it was developed that the answers of the witness on direct examination were based on hearsay, for which reason they were struck out on motion of defendant, defendant not having objected to the introduction of such testimony as hearsay during the direct examination, or requested that he be allowed to inquire into the nature of defendant's knowledge before such testimony was given, no error can be based on the failure of the trial court to exclude such testimony in the first instance.

Burning of Building: **ATTEMPTS TO BURN:** *Instructions.* Where defendant was charged with burning a building, an instruction that if the jury find that the building was in some appreciable degree burned or consumed, or that the fire was communicated to the woodwork or other inflammable materials of which it was constructed, so that the same were in some measure destroyed, and the building would probably have been wholly destroyed if such flames had not been extinguished, it would be sufficient to support the crime charged, was not prejudicial to defendant as destroying the distinction between the offense charged and the setting fire to a building with an intent to burn it.

EVIDENCE OF ARSON. Evidence which tended to show that flames charred and injured some of the window frames, casings and doors of a building, so that they had to be repaired, and in some instances wholly replaced, was sufficient to support an indictment for arson.

Extradition: INFORMATION AND INDICTMENT: *Variance.* Where defendant was extradited from Canada for setting fire to and burning a certain brick "house," occupied and inhabited as
5 a retail shoe store, and was indicted for setting fire to and burning a certain store "building" then and there occupied as a store, the objection that the crimes charged in the information and in the indictment were not the same was without merit.

Appeal from Polk District Court.—HON. C. A. BISHOP,
Judge.

TUESDAY, OCTOBER 2, 1900.

DEFENDANT was duly charged with, and convicted of, the crime of arson, and from such judgment appeals.—*Affirmed.*

Charles L. Powell and *McHenry & McHenry* for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

WATERMAN, J.—It is first contended by appellant that the indictment is insufficient because it is impossible to determine from its terms whether it charges a crime under section 4780 or under section 4781 of the Code. The first
1 of these sections imposes a penalty for the burning of a building, and the other for setting fire to a building with the intent to cause the same to be burned. The indictment, omitting its formal parts, is as follows: "The said Charles A. Spiegel, on the 21st day of February, A. D. 1899, in the county of Polk aforesaid, and state of Iowa, in the nighttime of said day, did willfully, feloniously, and maliciously set fire to and burn a certain store building then and there situated in Polk county, Iowa, then and there occupied by the Hub Shoe Company and by I. W. Cramer as a store building, and then and there owned by one C. H.

Martin, with a willful, malicious, and felonious intent then and there on the part of him, the said Charles A. Spiegel, the defendant, to cause the store building aforesaid to be then and there burned and consumed." This indictment contains some matter which is surplusage. It charges in clear and direct terms the burning of the building, and then adds, what is needless, a charge of intent to accomplish what was done. It seems to us obvious that the indictment charges an offense under section 4780. It was for this offense that defendant was tried, and of which he was convicted. He has no just ground of complaint as to the manner in which the charge was made. See *State v. Hull*, 83 Iowa, 112.

II. On direct examination a witness for the state was asked if he "ever found out whether there was such a firm as Herman & Co., of Hoboken, New Jersey?" To this he

2 answered, "Yes." In response to another question, he said there was no such firm. On cross-examination it developed that the witness' only knowledge of the matter rested on hearsay, and on defendant's motion the evidence on this point was excluded by striking it out. It is insisted that the court should not have permitted the witness to answer in the first instance, without a closer investigation as to his means of knowledge, inasmuch as the questions were objected to by defendant. We may preface what we have to say on this point with the statement that the objections interposed by defendant were not rested upon the ground that the evidence called for was hearsay. The witness was cautioned by the court to answer only from his own knowledge. Apparently he was doing so. We do not see what more the trial court could have done under the circumstances. Doubtless defendant, had he requested it, would have been permitted to inquire as to the knowledge of the witness before the answers were taken on direct examination, but counsel did not ask to do this.

III. By exceptions to instructions given and by requests to charge, the point is sought to be made that the evi-

dence does not show this building to have been burned. The court instructed the jury to find that the building was burned if it was "in some appreciable degree burned or consumed. * * * The burning is sufficient as an element in said crime, if it shall appear that the woodwork or inflammable parts of the said building were by the fire to some extent consumed. In other words, if fire was communicated to the woodwork or other inflammable materials of which said building was constructed or composed to such an extent as that the same were in some measure destroyed, the fire being shown to have been so communicated as that, unless put out, the said building would probably have been, as to the inflammable parts thereof, wholly destroyed, then the proof made will be sufficient to support the charge made in the indictment. If, therefore, you find from the evidence before you that the fire which was discovered in the building had so far progressed as that the woodwork or inflammable material in the room in question was found to be on fire, and that such woodwork was in some degree charred or destroyed by such fire, and that such fire, unless put out, would have gone on to a probable destruction of said building, then you will be justified in finding in the affirmative of the first proposition submitted to you," viz.

4 "that the building was in some appreciable degree consumed." The use of the phrase, that the fire would probably have consumed the building if not extinguished, is severely criticised as destroying any distinction between the offense charged and that of setting fire to a building with intent to burn it. But it is clear that the court gives this as but a part of the definition or description of the offense. In order to make out the crime charged, the jury are told they must find that the building was in fact burned to some extent. The phrase mentioned was surely not prejudicial to defendant, for it required the jury to find more than was essential in order to convict. The

evidence tended to show that the flames charred and injured some of the window frames, casings, and doors, so that they had to be repaired, and in some instances wholly replaced. This amounted to a burning of the building. *People v. Haggarty*, 46 Cal. 354; *People v. Simpson*, 50 Cal. 304; *Com. v. Schaack*, 16 Mass. 105; *Com. v. Tucker*, 110 Mass. 403; *People v. Butler*, 16 Johns. 203; *State v. Taylor*, 45 Me. 322; *State v. Hall*, 93 N. C. 571. The rule of these cases is that if there is actual ignition, and the fiber of the wood or other combustible material is charred, and thus destroyed, even in small part, the burning is complete. The instructions were correct in this respect, and fully covered the case.

V. Defendant was arrested in the dominion of Canada, and brought therefrom to the place of trial, on process issued under the extradition treaty with Great Britain. At the beginning of the trial defendant withdrew his plea
5 of not guilty, and filed a motion asking a discharge on the ground that the indictment charged an offense different from that upon which extradition was had. The overruling of this motion is made a ground of complaint. One argument presented is that, under the treaty between Great Britain and this country, a person could not be extradited for a statutory burning, but only for the common-law crime of arson, which is the burning of the inhabited dwelling house of another. We are not concerned specially with this question, for defendant was in fact surrendered to the authorities of this state. It only remains to be seen whether the charge then made was the same as that set out in the indictment upon which he was tried. The information which was the foundation of the extradition proceedings charged that defendant "did willfully and feloniously set fire to, burn, and consume a certain two-story brick house then and there situated, being the property of Charles H. Martin, and at the said time occupied and inhabited by the Hub

Shoe Company for carrying on a retail shoe business, and by Charles A. Spiegel for carrying on the business of making and selling fur goods, and by I. W. Cramer as a photograph gallery * * *” The only distinction between the information and the indictment is that in the former the building is called a “house,” and is averred to have been inhabited. “House” and “building” are synonymous terms. It will be noticed that it is not charged as being a dwelling house, and, while it is alleged to have been inhabited, what follows this word in the information shows that no more was meant than that the building was possessed and used; for it is charged that those who thus “inhabited” it did so for business purposes. The information and indictment charge the same act.—AFFIRMED.

GRANGER, C. J., not sitting.

THE STATE OF IOWA V. JOHN GEIER, Appellant.

Insanity: JURY QUESTION. Where, on a prosecution for murder, 2 the defense was insanity, the question of accused’s insanity was for the jury.

Qualification of Jurors: That a juror, on a prosecution for murder, where the defense was insanity, had heard the details of the crime, and had the scene of the same pointed out to him, 1 would not disqualify him, where it did not appear that he had heard anything as to the sanity or insanity of the accused, or expressed any opinion as to his guilt or innocence.

Appeal from Keokuk District Court.—HON. BENJ. MCCOY, Judge.

TUESDAY, OCTOBER 2, 1900.

THE defendant was indicted for murder in the first degree, and on trial was convicted of murder in the second

degree, and sentenced to imprisonment in the penitentiary for the term of fifteen years. From this judgment the defendant appeals.—*Affirmed.*

D. W. Hamilton and *C. H. Mackey* for appellant.

Milton Remley, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

GIVEN, J.—I. The evidence shows without conflict that on the evening of August 12, 1898, the defendant shot and killed Mathias Morhain. The claims of the appellant are that W. D. Adams, who sat as one of the jurors, was disqualified; that the defendant was not mentally responsible for the act at the time he did the shooting; and that the court erred in refusing an instruction asked by the defendant, to the effect that under the evidence the defendant could not be convicted of murder in the first degree.

II. The juror Adams, on examination as to his qualifications to sit as a juror, testified to the effect that he did not know the defendant; had never seen him until at the trial; that he had not talked with any person regarding the facts of the case; that he had not heard the particulars of the case; and had not formed or expressed an opinion as to the guilt or innocence of the defendant. The defendant, acting upon these statements, waived challenge of this juror peremptorily or for cause. In support of defendant's motion for a new trial, Sheriff Laffer and City Marshal Grimes made affidavit to the effect that on the night of August 12, 1898, they arrested the defendant at Talleyrand, where the shooting occurred, and that after placing him in jail they met W. D. Adams and E. G. Sampson, and stated to them "the facts and circumstances connected with the shooting as we had learned them at Talleyrand and from the defendant on the way from Talleyrand, and we at the same time stated that the killing was a cold-blooded murder." Mr. Sampson made affidavit to the same

effect, and A. D. Long testified to a statement by Adams that the officers had told him about the facts and circumstances of the case. H. H. Richardson testified that, when at Talleyrand in company with Adams before the trial, a party pointed out to them the place where the shooting occurred, the location of the parties, where the man who was killed had fallen, where the defendant lived, "and giving us a detailed statement of the transactions surrounding the shooting." Mr. Adams made affidavit, in effect, denying these statements of the witnesses, and reiterating his first statements as made at the impaneling of the jury. The oral examination of these persons shows it possible that Adams may not have heard the statements said to have been made, and that the place was pointed out from a distance. The only defense in the case is that the defendant was not mentally capable of judging of his acts at the time he did the shooting, and it will be observed that nothing was said and no opinion was expressed by any of these persons on that subject. Their statements were entirely as to facts that are undisputed. If it were otherwise, still it will be noticed that Adams expressed no opinion. The fact that Adams heard these statements did not disqualify him from sitting as a juror. *State v. Munchrath*, 78 Iowa, 286; *State v. Brady*, 100 Iowa, 194. There was no error in overruling the defendant's motion for a new trial on the ground that the juror Adams was disqualified.

III. The question as to the defendant's mental condition at the time he did the shooting was for the jury to determine. It was submitted under proper instructions, and the jury was fully warranted in finding that he was legally responsible for his act in shooting the deceased.

IV. As to the instruction asked by the defendant and refused, we think there was no error in refusing it. There is much in the circumstances of the case as shown by the evidence to support the claim of murder in the first degree,

and it was clearly the duty of the court, under the indictment and evidence, to submit that issue to the jury. We do not find any error in the record, and the judgment is therefore **AFFIRMED**.

GRANGER, C. J., not sitting.

THE STATE IOWA v. JOHN MCGARRY, Appellant.

Instruction: REASONABLE DOUBT. Where one of the defenses was an alibi, and the court charged that if the defendant had failed to establish the defense of alibi by a preponderance of the testimony he was not entitled to an acquittal on that ground or to have it considered as a basis of a reasonable doubt.

1 *Held*, the instruction was erroneous because if the testimony

2 to sustain the alibi fell short of a preponderance, it was still to be considered by the jury, together with all the other evidence, and a reasonable doubt upon all the evidence, including that which failed to sustain the alibi by a preponderance, entitled defendant to acquittal. The word "it" was misleading. The jury may well have applied it to the *testimony* in support of the alibi, rather than to the *defense* called alibi.

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Appeal from Dubuque District Court.—HON. J. L. HUSTED, Judge.

WEDNESDAY, OCTOBER 3, 1900.

INDICTMENT for murder in the first degree. From a judgment entered on a verdict of guilty of murder in the second degree, defendant appeals.—*Reversed*.

Alphons Matthews and *P. J. Nelson* for appellant.

Milton Remley, Attorney General, and *Henry Michel* for the State.

WATERMAN, J.—The first matter presented relates to a claimed error of the court in overruling a motion to quash the indictment. No reasons are given in support of this contention, so we deem it sufficient to say, after a careful examination of the record, that the action of the trial court in this respect was fully justified.

II. One defense of which evidence was offered was an alibi. On this subject the trial court gave the following instructions: (13) The defendant makes as one of his defenses herein what is known as an 'alibi;' that is, that at the time of the commission of the crime charged in the indictment he was at a different place, so that he could not have committed it. The testimony in support of this defense, to be entitled to weight, must be such as to show that, at the very time of the commission of the crime, the defendant was at another place so far away, or under such circumstances, that he could not have been at the place where the crime was committed. The burden of establishing this defense by a preponderance of credible testimony is upon the defendant. If he has so established it, he is entitled to an acquittal. (14) If, however, the defendant has failed to establish this defense by a preponderance of the credible testimony, then he is not entitled to an acquittal upon this ground, nor to have it considered by you as a basis of a reasonable doubt." The last of these instructions does not correctly state the law. While as a distinct issue an alibi must be established by a preponderance of evidence (*State v. Hamilton*, 57 Iowa, 596, and cases cited therein), yet, if the evidence offered to show it falls short of this in weight, nevertheless such evidence is for the consideration of the jury; and if upon the whole case, including that part pertaining to the alibi, they have a reasonable doubt of defendant's guilt, he should be acquitted. In *State v. Maher*, 74 Iowa, 77, this court said on the subject: "The court below, in one or more instructions, directed the jury, in substance, that the alibi relied upon as

a defense must be established, if at all, by the preponderance of evidence. Another instruction directs the jury, in effect, that if upon the whole evidence, including that tending to establish the alibi, they entertained a reasonable doubt, they should acquit. Counsel for defendant insist that these instructions are contradictory and misleading. We are of opinion that they harmonize, and each and all, considered together, accord with the doctrine, recognized by this court. Under these instructions, the jury are required to find the alibi upon the preponderance of the evidence, but, if a reasonable doubt of defendant's guilt remains in their minds after weighing all the evidence, they must acquit. They cannot acquit on the defense of alibi unless it is supported by the preponderance of the evidence; but if the evidence upon that defense, considered alone, or in connection with all other evidence, leaves a reasonable doubt in the minds of the jury, they cannot convict. The instructions accord with the doctrines of this court pertaining to the subjects of alibi and reasonable doubt." While this language was used with relation to exceptions taken by a defendant to the instructions, the rule announced is unequivocal, and in line with the weight of authority. For a collection of cases, see 2 Am. & Eng Enc. of Law, 53. The doctrine laid down in *State v. Maher*, on this subject, is expressly approved in *State v. Hatfield*, 75 Iowa, 592. See, also, *State v. Fry*, 67 Iowa, 475; *State v. Kline*, 54 Iowa, 183; *State v. Hardin*, 46 Iowa, 623. In some other jurisdiction where an alibi is treated as a distinct defense, and to be available must be established by a preponderance of evidence, the same qualification, as announced in *State v. Maher*, is adopted. *People v. Lee Sae Bo*, 72 Cal. 623 (14 Pac. Rep. 310); *People v. Fong Ah Sing*, 64 Cal. 253 (28 Pac. Rep. 233); *People v. Lee Gam*, 69 Cal. 552 (11 Pac. Rep. 183); *People v. Tarm Poi*, 86 Cal. 225 (24 Pac. Rep. 988); *People v. Chun Heong*, 86 Cal. 329 (24 Pac. Rep. 1021); *State v. Ward*, 61 Vt. 153 (17 Atl. Rep. 483). It is manifest that the instruction given in the

case at bar is not in harmony with the rule stated. The jury are told, in effect, that, if the evidence relating to the alibi does not so preponderate as to establish that distinctive fact, it cannot be considered or used as a basis for a reasonable doubt. While such evidence is admissible always, without regard to its weight, and is for the consideration of the jury with the other testimony in the case, and while all the admitted testimony should be considered, in order to determine whether a reasonable doubt of guilt is produced in the minds of the jury, yet here they are told to disregard certain received evidence, if it does not measure up to the standard of establishing a specific fact. Some support for the instruction under consideration is sought in the language used by this court in *State v. Maher, supra*. The trial court in that case gave this paragraph of an instruction: "If the proof [fails to show the alibi] as to either defendant on trial, you will not consider it as to him; but, if it does so show as to either, you will give it full consideration as to the defendant of whom it so shows." This instruction, as it appears in the abstract, does not read just as we have set it out. Something seems to have been omitted in printing it. We quote it as this court found it must have been in the original. In approving this paragraph, Beck, J., who delivered the opinion, said: "Counsel for defendant understand that the court below in the third and fourth paragraphs of the instruction, in the use of the words 'consideration' and 'consider,' directed that the jury should not consider the evidence pertaining to the alibi. But the language will bear no such interpretation. The words are applied to the defense of alibi, and not to the proof tending to establish it. Of course, if the alibi is not established by a preponderance of the evidence, it is not to be considered as proved. It must have no consideration by the jury in controlling their finding upon that defense." We are not inclined to extend this reasoning, nor to adopt it, if at all, in any other than precisely similar case to that in which it was thus applied. In

the case at bar, however, when the facts are considered, the instruction apparently goes further than did the one thus approved. Here there is but one defendant to whom reference is made; in the *Maher Case* there were two and this court might well have construed the introduction in that case as meaning, only what it says, viz., that the alibi was to be considered only in behalf of the particular defendant in whose favor it was established. Here, too, the language

is more explicit in its apparent reference to the
2 testimony. We do not see how the jury could have construed the pronoun "it" in the last line of the fourteenth paragraph, save as referring to the testimony and not to the alibi; for clearly it is the testimony, and not the specific defense, that could be used as the basis for a reasonable doubt. If the alibi is made out, it is a complete defense, and an exoneration of defendant. It can not be said only to aid in raising a reasonable doubt of guilt. If it is not established, there can be nothing for consideration but the testimony introduced in support of it. We think the jury must have understood the instruction as shutting out from their consideration all the evidence relating to the alibi if they failed to find that defense established. But if the meaning of this instruction is even reasonably doubtful,—and there can be no question but it is open to the construction we suggest,—defendant is entitled to the benefit of such doubt.

III. A number of other matters are discussed by counsel, but, as they are not likely to arise again, we dismiss them without further mention than to say that the cross-examination of the witness Straney was permitted to go to an extreme length. No argument is made upon the facts, but it is proper for us to say, after a careful perusal of the record, that the case was one for the jury. For the error in the instructions a new trial is ordered, and judgment REVERSED.

GRANGER, C. J., not sitting.

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THE STATE OF IOWA v. S. D. CLOUGH, Appellant.

Perjury: EVIDENCE: *Corrupt motive.* On a prosecution for perjury in falsely swearing in an affidavit for a cost bond that plaintiff in a suit was a corporation, evidence warranting a finding that
2 accused had no reasonable cause for believing plaintiff to be a corporation, and that the affidavit was made to secure a dismissal of the case, is sufficient to show a corrupt motive in making the affidavit.

ADMINISTRATION OF OATH: *Evidence.* On prosecution for perjury in falsely swearing to an affidavit, the certificate of a clerk of
7 courts, attached to such affidavit, and proof of his handwriting is sufficient *prima facie* evidence of the jurat, and that he performed his duty as clerk.

EVIDENCE TO SUPPORT CONVICTION: *Corroboration.* Evidence by two witnesses that a certain firm was not acting as a corporation,
1 with corroborating facts showing that it was not a corporation, is sufficient to support conviction for perjury in falsely swearing in an affidavit for a cost bond that such firm was acting as a corporation.

OATH: *Jurisdiction to administer.* A suit was begun in Polk county against defendant, who was a resident of Warren county, and others. The action appears to be *in rem*. It does not appear whether a personal judgment was sought. While this suit was pending in Polk county, one involving the same matter, and seeking personal judgment was brought in Warren county. Defendant appeared in that court and applied for
3 a cost bond. Before any objection was raised to the jurisdiction of the Warren county court, defendant made an affidavit, in support of his said application, upon which affidavit perjury is charged. *Held*, conceding that the actions were such that a plea in abatement would lie, yet the Warren county court had acquired jurisdiction to entertain said affidavit, which jurisdiction it would retain until some reason was shown why it should no longer retain jurisdiction.

PROVINCE OF COURT AND JURY: *Jurisdiction.* On a prosecution for perjury in falsely making an affidavit for cost bond in a civil
4 action, the court may properly instruct that such civil court had jurisdiction to determine the application for cost bond, as jurisdiction is a question of law.

SAME. And that the matter charged to be falsely sworn to is
5 material, and that a clerk of the courts had right and authority
6 to administer the oath.

Appeal from Warren District Court.—HON. J. D. GAMBLE,
Judge.

WEDNESDAY, OCTOBER 3, 1900.

THE defendant was convicted of the crime of perjury,
and appeals.—*Affirmed.*

A. A. McGarry for appellant.

Milton Remley, Attorney General and Chas. A. Van
Vleck, Assistant Attorney General, for the State.

SHERWIN, J.—The defendant was convicted of falsely
swearing, in an affidavit for a bond for costs, that A. West
& Son were acting as a corporation, doing business at Des
Moines, Iowa. The defendant contends that there is not
sufficient corroborative evidence that they were not
1 so acting to sustain the verdict. We think otherwise.

The testimony of A. West on this point was sustained
by that of another witness, who had made inquiries as to the
matter, and by facts and circumstances before the jury
which tended to show that they were not a corporation. The
law is well settled that the required corroboration may be
furnished by facts and circumstances, as well as by direct
and positive testimony. *State v. Raymond*, 20 Iowa, 582;
2 Wharton Criminal Law, section 2276.

The defendant also insists that no corrupt motive ap-
pears in the evidence. An action had been brought by A.
West & Son against this defendant in the district court of
Warren county, claiming the sum of one hundred and twenty-
one dollars for service rendered. Before answer
2 the defendant herein appeared, and filed an affidavit
that he had a good defense to the action, and that A.

West & Son was a corporation, and on the strength of this affidavit he asked that A. West & Son be required to give a bond to secure payment of the costs. This motion was granted, and a bond ordered. It does not appear to have been furnished, however, and the case was dismissed without prejudice, and the costs taxed to the plaintiff therein. The statute provides that a cost bond must be furnished when the plaintiff is a private corporation. The jury was fully warranted in finding that the defendant had no reasonable ground for believing A. West & Son to be a corporation, and for the further finding that the affidavit was made for the purpose of accomplishing the dismissal of the case.

Before the suit of A. West & Son against the defendant was begun in Warren county, A. West & Son had filed a statement for a mechanic's lien for the services claimed therein, in Polk county, where the work was done, and an action in equity had been brought thereon in the name of Ewing & Jewett against A. West & Son, this defendant, and others, which action was pending at the time the affidavit in question was made by the defendant in the case against him in Warren county. It is claimed that the district court of Warren county had no jurisdiction in the action pending there, because of the action in equity then pending in Polk county. The defendant was at the time a resident of Warren county. Notice was properly served upon him there, and he appeared in that action, and before answer, and before any question was raised as to the jurisdiction of the court, filed the affidavit in question. The action there was a personal action. In Polk county he was a co-defendant with A. West & Son in an action *in rem*, and whether a personal judgment was therein prayed against him the records do not disclose. All requirements necessary to give the court in Warren county jurisdiction of the person of the defendant had been compiled with, and the defendant in the action was before the court with his application for a cost bond. That the court had complete jurisdiction of the

defendant seems to us clear. Conceding that the actions were such that a plea in abatement would lie under the statute, the court, having properly acquired jurisdiction of the case, would retain the same until some reason was shown why it should not further do so. The rule contended for by the defendant, that the court first acquiring jurisdiction of a particular case will retain the same to the exclusion of another court of concurrent jurisdiction, is not applicable to this case. Before this rule can apply, it must appear that the suits are between the same parties, seeking the same remedy. 12 Enc. Pl. & Prac. 153; *Guest v. Byington*, 14 Iowa, 30. Where this is shown, public policy and the stability and certainty of judicial action demand that the court first acquiring jurisdiction have exclusive right to finally hear and determine the controversy.

The question of the jurisdiction of the district court of Warren county in the civil suit in question was one of law for the court to determine under the evidence and
4 record before it, and it did not err in directing the jury that the court had jurisdiction to hear and determine the application for a bond for costs.

The court instructed the jury that the matter in the affidavit for a cost bond charged to be false and untrue was
5 a material matter in the proceedings then pending, and complaint is made of this. This instruction is fully supported by *State v. Caywood*, 96 Iowa, 367; *State v. Swafford*, 98 Iowa, 362.

The court also instructed the jury that the clerk of the court in Warren county, who administered the oath to the defendant, had the "right and authority to do
6 so." This was purely a question of law, and the instruction was correct.

The evidence conclusively shows that the defendant swore to his affidavit before A. V. Proudfoot, who was at the time clerk of the district court of Warren county. On

the trial the affidavit, with the clerk's jurat annexed, was put in evidence, and the signature of the clerk was proven by other evidence. The court told the jury that the proof showed that A. V. Proudfoot was the duly-elected clerk. The defendant says there is no evidence to sustain this. In this he is wrong. The certificate of the clerk, on proof of the handwriting of his signature thereto, is competent and sufficient *prima facie* evidence of the jurat, and that he performed the duties of the clerk, which was sufficient. 2 Wharton Criminal Law, section 2272. The judgment is AFFIRMED.

GRANGER, C. J., not sitting.

M. L. THOMSON, Appellant, v. J. B. SMITH, Defendant. T. J. PEARSON & BROTHER, Intervener.

Scales: WHEN FIXTURES. Wagon scales to weigh grain, placed on a foundation wall of stone and mortar, on which the platform hung, and from underneath which rods extended under a building used as an office, and up through the floor to the beam from which the weight was ascertained, became a fixture.

CONDITIONAL SALE: Vendor's lien. Where the vendor sold wagon scales to the defendant, on condition that title should not pass until the price was paid, but, before receiving his money, allowed them to be set up for use on defendant's lot, and the lot was sold at sheriff's sale on a judgment against defendant, the purchaser at such sale, who had no notice of the vendor's lien until after he had taken possession under the sheriff's deed, was entitled to the scales, as against the vendor.

Appeal from Madison District Court.—HON. A. W. WILKINSON, Judge.

WEDNESDAY, OCTOBER 3, 1900.

A decree was entered foreclosing a mechanic's lien in favor of the Frost Manufacturing Company, and also one

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in favor of M. L. Thomson, on the sixteenth day of October, 1896. The lot, with appurtenances, was sold thereunder to the plaintiff June 17, 1897, and a sheriff's deed executed to him a year later. Because of defendant's threat to remove certain machinery from the premises, he was enjoined in this action from so doing. T. J. Pearson & Bro. intervened therein, alleging the sale of the wagon scales situated on the lot to the defendant, on the condition that the title was not to pass until the purchase price was entirely paid, and that eighty dollars was still due; and judgment was asked for the value thereof. The plaintiff answered that he purchased without notice, and acquired title to the scales under the sheriff's deed. Judgment was entered as prayed by intervener, and the case comes here on an appeal of the plaintiff, allowed by the trial judge.—*Reversed*.

Steele & Robbins and Cummins, Hewitt & Wright for appellant.

Sam C. Smith for appellees.

LADD, J.—The plaintiff, as purchaser at the sheriff's sale, had no notice of the intervener's claim to the wagon scales until after he had taken possession of the premises under the sheriff's deed. He then acquired precisely
1 the same right to the fixtures under the deed as though he had bought directly from the defendant, and, conceding the sale of the scales by intervener to defendant to have been conditioned as contended, this would not affect the title of a third party buying in good faith without notice. *Stilman v. Flennicken*, 58 Iowa, 454; *Bringhoff v. Munzenmaier*, 20 Iowa, 513; 13 Am. & Eng. Law, 628. Under our statute, the intervener, in the absence of notice to the purchaser, would have been entitled to no protection, had the scales been sold as personal property. Section 2906, Code. If they became attached to the realty, and a part of it, a

sale of the land under like conditions would as certainly carry title thereto. The vendor, having put it in the power of the vendee to attach them as a fixture to the land, and as such to sell to innocent purchasers, is not in a situation to complain when this was done. *Wickes v. Hill*, 115 Mich. 333 (73 N. W. Rep. 375. See *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works*, 15 Tex. Civ. App. 694 (41 S. W. Rep. 835); *Fifield v. Bank*, 148 Ill. Sup. 163, 39 Am. St. Rep. 166, note (s. c. 35 N. E. Rep. 802); *Muir v. Jones*, 23 Or. 332 (19 L. R. A. 441), note (s. c. 31 Pac. Rep. 646).

II. But were these wagon scales fixtures at the time of the sale? The building on the same lot was equipped with machinery for, and used as, a feed mill. The scales rested on a foundation wall of stone and mortar, 2 within which the platform hung. The earth was removed somewhat below the surface, leaving a pit within the walls about twenty inches deep. The only testimony indicating the manner of attachment to this wall is that of defendant, who said: "The scales are not hung to the frame. They set on castings in the corner,—the stirrups that set in the castings. It was necessary to put down a solid foundation for these castings to set on; that is, two by twelve plank laid on the stone, the castings on the corners, and the scales set in those castings, just framed around the outside,—six by six or six by eight timber." As we understand this, the platform of the scales, on which wagons are drawn, was hung by stirrups attached to its frame, in castings resting on plank laid on the foundation. From beneath this platform the supporting rods extended through the wall under the building through its floor to the beam on the inside, where the weight was ascertained. The record fails to disclose whether any part was fastened in any way, save as indicated, to the wall or building. But it may be assumed that, as large amounts of grain were weighed, the fastenings were sufficient to hold the scales in their proper place. It

should also be added that up to October, 1896, the defendant got along with small scales in the mill; and at that time he began dealing in grain for shipment, and put in the scales in controversy mainly for that purpose. The grain was weighed thereon, and then hauled to the cars; but he made use of his office in the mill in carrying on this business, and weighed thereon at least one-fourth of the grain to be ground in the mill. In *Woolen Mill Co. v. Hawley*, 44 Iowa, 57, the court recognized the united application of the following requisites to be the true criterion in testing whether an article is a fixture: (1) Actual annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; (3) the intention of the party making the annexation to make a permanent accession to the freehold. The intention was treated in that case as a matter of paramount importance, and this seems to be the modern rule, but the first and second requisites were by no means dispensed with. Annexation is the *sine qua non* of an article, in order that it be a fixture. But it has long been recognized, as in the above case, that a physical attachment to the realty is not always essential. *Society v. Fleming*, 11 Iowa, 533. *McGorrick v. Dwyer*, 78 Iowa, 279; *Shepard v. Blosson*, 66 Minn. 421 (69 N. W. Rep. 221, 61 Am. St. Rep. 431); Washburn Real Property, 14; *Feder v. Van Winkle*, 53 N. J. Eq. 370 (33 Atl. Rep. 399, 51 Am. St. Rep. 628; 13 Am. & Eng. Enc. Law, 605). Thus, in the early case of *Walker v. Sherman*, 20 Wend. 636, Cowan, J., remarked that: "Nothing of a personal nature in itself would pass under a deed to land unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building." And in

Wolford v. Baxter, 33 Minn. 18 (21 N. W. Rep. 745), the court, through Mitchell, J., said "that, to make an article a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or at least it must be mechanically fitted, so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete." Boilers and engines by which machinery is propelled, merely resting on suitable foundations, have been repeatedly declared a part of the land. This is because so fitted to the foundations, which are unquestionably of the realty, and erected for the special purpose of sustaining them, that they are deemed a portion of the structure. And in numerous cases retention of heavy machinery or structures in place by force of gravity has been deemed sufficient attachment. *Snedeker v. Warring*, 12 N. Y. 170; *Holland v. Hodgson*, L. R. 7 C. P. 334; *Paper Co. v. Servin*, 130 Mass. 511; *Smith v. Blake*, 96 Mich. 542 (55 N. W. Rep. 978); *Langdon v. Buchanan*, 62 N. H. 657; *Manufacturing Co. v. Gleason*, 36 Conn. 86. So, while these scales may not have been physically attached, by bolts, nails, or cement, to the land, they were nevertheless held thereto by being so mechanically fitted as that the platform hung within the wall supporting it and erected for that sole purpose, and the supporting rods entering the building through its walls and floor, connecting with the beam above. Besides, such scales are ordinarily placed for permanent use in connection with particular real estate. True, they might have been removed, by taking apart, without injury to the land. This, however, is not a controlling circumstance, and is of chief importance as bearing on the intention with which the attachment was made. *Doughty v. Owen* (N. J. Ch.) 19 Atl. Rep. 540; *Sweetzer v. Jones*, 35 Vt. 317 (82 Am. Dec. 639). See cases collected in 13 Am. & Eng. Enc. Law, 602.

The connection was sufficient to bring the case within the first requisite.

III. That the scales were placed for use in connection with the building admits of no doubt. The office therein was occupied by the defendant both in operating the mill and in dealing in grain for shipment. While the scales could possibly have been dispensed with in the former business, though with much inconvenience, they could not well have been in the latter. Besides, their actual rather than necessary use is the point involved. They were not only used in connection with the building in both businesses, but were set for that express purpose.

IV. The character of the annexation and the use, if found, is mainly of importance in determining the intention of defendant in making it. This intention is not the secret purpose of the owner, but that which should be implied from his acts. This is ordinarily to be inferred from the nature of the article, the manner and object of its use, and mode of its annexation. *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519 (23 N. E. Rep. 327, 15 Am. St. Rep. 235); *Rosville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 3 29 (22 Am. St. Rep. 373). Everything indicates that the scales were intended to remain permanently where located, and to be continually used in connection with the land,—the character of the foundation, the connection with the beam inside, their convenience in defendant's business, both as miller and dealer in grain. That they extended a few inches into a neighboring lot is not material to this inquiry, as the owner of that made no objection. As well say a house a few inches over the line is not real estate. In *O'Donnell v. Burroughs*, 55 Minn. 91 (56 N. W. Rep. 579), relied on by the appellee, the scales were in the street. But see *McGorrisk v. Dwyer*, 78 Iowa, 279, where track scales, though on the land of a railroad, were held to be fixtures attached to the building similarly situated. *Arnold v. Crowder*, 81 Ill. 56 (25 Am. Rep. 260); and *Bliss*

v. Whitney, 9 Allen, 114, hold similar platform scales part of the realty. We are of opinion those in controversy were intentionally annexed permanently to the land, and passed with it under the sheriff's deed.—REVERSED.

GRANGER, C. J., not sitting.

APPENDIX.

Notes of Cases Not Otherwise Reported.

J. N. MINER, Plaintiff and Appellee, v. L. H. RHYNDERS, Defendant, and Appellee. CHARLES CITY NATIONAL BANK, Intervener and Appellant.

EXPIRATION OF CONTRACT: *Title to property bought with advances.*

Defendant, being indebted to a bank, entered into an agreement with it, whereby he agreed to purchase horses with funds to be furnished by the bank, and resell the same, and turn
1 the proceeds over to the bank, it to have title to the horses until resold, and to apply the profits of such transactions to the payment of defendant's indebtedness. After the indebtedness was paid, defendant continued to borrow of the bank, and later entered into partnership with plaintiff, and bought and sold horses. *Held*, that the object of the original agreement with the bank having been accomplished, it thereafter had no lien on horses purchased by the firm, in part, with money borrowed by defendant from the bank.

APPEAL: *Objection below.* On appeal, a party will not be awarded
2 relief not claimed in the petition, and asked for on a theory, advanced for the first time on appeal.

Appeal from Floyd District Court.—HON. J. C. SHERWIN, Judge.

FRIDAY, MAY 11, 1900.

THE original suit was for a partnership accounting between plaintiff and defendant, Rhynders. A receiver was appointed, who sold certain property alleged to belong to the firm. The Charles City National Bank intervened, claiming that it held a lien on the property sold by the receiver, and asking that the money received be turned over to it. The case was tried to the court, resulting in a decree and judgment for plaintiff, and an order dismissing the interveners petition. Intervener appeals.—*Affirmed.*

Blythe, Markley & Smith for appellant.

Ellis & Ellis for appellee Miner.

P. W. Burr for appellee Rhynders.

DEEMER, J.—Plaintiff, as we have said, sued defendant, Rhynders, for a partnership accounting, alleging that certain horses which we will denominate as the “Postville horses,” were purchased by defendant with partnership funds, asking the dissolution of the partnership, the appointment of a receiver, and general equitable relief. Defendant answered, denying the partnership, and that plaintiff had any interest in the horses in controversy. He alleges that he purchased and paid for the horses, and that they are his individual property. The intervener claims that it furnished the money with which the horses were purchased under an agreement with defendant by the terms of which it was to furnish defendant Rhynders with money with which to buy horses; that he (Rhynders) should buy horses with the money so furnished, ship them, bring back the proceeds, and that the horses should belong to the bank, until sold and the proceeds returned; that, in virtue of this agreement, it had a lien on the horses, and on the proceeds thereof now in the hands of the receiver appointed in the main suit. Plaintiff denied the allegations of the intervener’s petition, and says that the horses were purchased with partnership funds. Shortly before the case was brought on for trial, defendant Rhynders filed an answer to the petition of intervener, in which he practically denied all the allegations thereof. He further pleaded that he and plaintiff formed a partnership in February, 1893, for the purchase and sale of horses; that the horses in controversy were purchased by the partnership with funds belonging to it, and belonged to the firm. A stipulation between plaintiff and defendant was filed, in which it was agreed that there was a partnership existing between them, finding the amount due plaintiff, and agreeing to judgment for the amount thereof. It was also agreed that the horses in controversy, and the funds derived from the sale thereof, belonged to the firm. A decree was entered pursuant to this stipulation, and the case was then tried to the court on the issue between the intervener and plaintiff, and defendant, resulting in the decree hitherto mentioned.

The sole question presented seems to be one of fact, and that is, were the “Postville horses” purchased with money furnished by intervener under the agreement pleaded by it, or were they purchased with money belonging to the partnership existing between plaintiff and defendant? That there
1 was a partnership arrangement between plaintiff and

defendant entered into at about the time claimed is conceded. It is also shown without dispute that intervener advanced money to defendant from time to time, and that it at one time had an arrangement with defendant for the furnishing of money. The exact terms of this agreement are in dispute, however. Intervener does not claim anything, in virtue of its being a partnership creditor, and want of notice is not relied on by plaintiff.

From a careful consideration of the evidence, we are led to the conclusion that the intervener made an arrangement with defendant some years before plaintiff entered into a partnership with him (defendant), by which the bank agreed to advance defendant money with which to buy horses; defendant agreeing that he would buy horses, ship them to market, and bring back the proceeds, and that the horses so bought should belong to the bank until sold and the proceeds returned. At the time this arrangement was made, Rhynders was owing the bank six hundred and seven dollars, and the agreement was made in order to give him (Rhyn-ders) an opportunity to pay this debt. The debt was paid within a year after this arrangement was made. But defendant continued to borrow money from time to time thereafter. No further arrangement was made, and for a part of the time, after the agreement was entered into, defendant bought horses on commission, and a part of the time he bought with money furnished by the bank. Long after the original agreement was made, plaintiff and defendant entered into partnership for the buying and shipping of horses, and the "Postville horses" were acquired by this partnership. It may be that the bank furnished the drafts with which these horses were purchased, but that the money was loaned by the bank for this purpose is extremely doubtful. In any event, as the purpose of the original agreement had been fulfilled, the bank became a simple creditor of the defendant for money thereafter advanced.

It would not have a lien for money furnished without express contract, and we are constrained to hold that the original contract giving the right had expired by its terms. Confirmation of this view is found in the fact that intervener, at one time, commenced an attachment suit against defendant, in which it claimed judgment for balance due, and asked an attachment against defendant's property. Nothing was said in this petition about any lien on property. But, if mistaken in this view, still intervener is not entitled to recover.

Defendant had from one thousand two hundred dollars to one thousand eight hundred dollars of his own that he used in the business. This he used with money drawn from the bank, and no distinction was made in the funds. His account was kept in the ordinary manner, and sometimes disclosed a balance in his favor, and sometimes a debit balance. No attempt was made to keep a

separate account for each shipment of horses. At the time of the last shipment Rhynders was indebted to the bank in the sum of two thousand and twenty dollars and fifty-one cents. He received from the last shipment drafts amounting to five thousand one hundred dollars, and drew out during the month five thousand two hundred dollars and fifty-nine cents, leaving an overdraft at the end of the month of two thousand one hundred and twenty-one dollars and ten cents. The shipment to which we have referred was made by the firm of which plaintiff was a member, and the proceeds undoubtedly belonged to the firm. At least there was no showing that the horses so shipped were purchased with the money belonging to the bank. The "Postville horses" were purchased in part, at least, with money furnished by the bank, but it evidently came out of the proceeds of the shipment made by the firm; for the evidence plainly shows that, as soon as the five thousand one hundred dollars was deposited, the bank issued the drafts that went to pay for the "Postville horses." From this statement of facts it is apparent that intervener is not entitled to a decree establishing a lien on the horses known as the "Postville horses" or the proceeds thereof. But it is claimed in argument that inter-

2 vener is a partnership creditor, and as such is entitled to judgment against the partnership, and a decree giving it a first lien on the partnership assets in preference to the claims of other partners. This contention seems to be raised for the first time in this court. The claim is not made in the petition, and no such issue was tendered as would justify this relief. Intervener claims a lien in virtue of the arrangement made with defendant for furnishing money. It nowhere asserts that it is a partnership creditor, and, of course, is not entitled to a decree establishing its claim as such. We are content with the conclusions of the trial court, and the decree is **AFFIRMED.**

SHERWIN, J., took no part.

C. E. IRWIN AND ELIZABETH PHILLIPS, Administratrix, Appellants,
v. W. R. COOPER *et al.*

CONTRACT OF PARTNERSHIP: *Held superseded by oral contract.*

Plaintiff furnished defendant funds to purchase a quartz mill to be used in Arizona, and, in consideration, took an interest in mining claims, with the agreement that if the venture should prove a failure or plaintiff desired to withdraw, defendant should be responsible for the money paid on the mill, less any sums received by plaintiff as profits in the business. Plaintiff went to the mine in Arizona, paid off the workmen, and fur-

nished considerable money in addition to that furnished under the contract. A bill of sale was given to a son of the plaintiff, without consideration, and he took charge. The venture was a failure. *Held*, in an action to recover on the contract, that the evidence was sufficient to support a finding that the written contract had been superseded by an oral contract of copartnership, and hence plaintiff was not entitled to recover.

TRANSFER TO LAW SIDE: *After amendment tendering equitable issue.* Where plaintiff's petition, alleging a copartnership between himself and defendant, and asking for an accounting, 2 was amended so as to recover under a written contract, it was not error to refuse plaintiff's motion to transfer the entire case to the law side of the court, after defendant had filed an equitable answer in effect asking for an accounting and that another party be brought in, as under defendant's answer an equitable issue was tendered, which could not be tried by a jury.

Appeal from Mills District Court.—HON. WALTER I. SMITH, Judge.

SATURDAY, MAY 12, 1900.

ACTION in equity to recover money advanced for the development of a mining enterprise. There was a judgment for defendants. Plaintiffs appeal.—*Affirmed.*

Frank Shinn, W. S. Lewis, and C. E. Dean for appellants.

John Y. Stone and E. B. Woodruff for appellees.

SHERWIN, J.—Elizabeth Phillips is the widow of Thomas Phillips, deceased, and the administratrix of his estate. This action is to recover two thousand dollars, each, by the plaintiffs, under a written contract which is as follows: "Articles of 1 agreement made and entered into by and between Thos. Phillips and C. E. Irwin, of Henderson, Iowa, of the first part, and W. R. Cooper, of Henderson, Iowa, and W. T. Cooper and T. K. Mitchell, of Dos Cabezas, Arizona, of the second part: Thos. Phillips and C. E. Irwin of the first part, agree to pay four thousand dollars (\$4,000) on the purchase of a Huntington quartz-mill plant, of a capacity of twenty tons per day, or what is known as a 'five-mill plant.' Said mill to be shipped and set up for use at the Cooper mining camp, at Dos Cabezas Mountains, Cochise, Cochise county, Arizona. And any amount that said mill plant may cost over the said four thousand dollars shall be paid by all parties equally. In consideration of the payment of the four thousand dollars as above specified, W. R. Cooper, W. T. Cooper, and T. K. Mitchell, all of the second part, agree to give Thos. Phillips and C. E. Irwin, of the first part,

a one-fourth interest in ten mining claims. Five are the Gold Cup group, located on the north side of Dos Cabezos Mountains in Cochise county, Arizona, and five of said mines are located on the south side of said mountains, and in said county. The names of the same are as follows, as far as can now be named: The mine known and recorded as the 'Sons of America,' and one recorded as the 'Blaine Mine,' and one recorded as the 'Cicazo Mine.' Not being able now to state the name of other two mines, state that the Mescal group is not included in this contract, but does include five owned by said parties, the names to be ascertained hereafter. And we also give said Phillips and Irwin an equal interest with us in town site, should one be laid out at the base of said mountain, and in the valley southwest from said mine. The town site referred to shall mean the one platted and surveyed for the purpose by any member of this company. And we agree that should this enterprise prove a failure, or they become dissatisfied and wish to withdraw, we will be responsible for the four thousand dollars paid on said mill. We will take said mill, and return to them their four thousand dollars, with eight per cent. interest from the dates they make said payments. But any money they receive as their share from profits of said milling business shall be applied on said four thousand dollars, as part payment so far as it may go, if they wish to withdraw from said company." The defendants, except W. T. Cooper, admit making the above contract, and that plaintiff Irwin and Thomas Phillips furnished the four thousand dollars for the purchase of the quartz mill, and it clearly appears from the evidence that the venture was a failure. But the defendants plead that the written contract above set out was afterwards abandoned by mutual agreement, and the said Irwin and Thomas Phillips verbally agreed to furnish other sums of money, not to exceed ten thousand dollars, for the development of the enterprise, and for the payment of the debts then existing, in consideration of which they were to have and hold each a quarter interest in the mining property described, instead of the eighth interest provided for in the written contract; that they did furnish a part of said sum, and took the active management and control of the property for awhile, but did not pay all claims and debts then existing against the property, as agreed, and finally abandoned it. The defendant W. R. Cooper prayed a dissolution of partnership, and for an accounting, and for a reformation of the written contract.

The plaintiffs' first contention is that the court erred in not transferring the entire cause to the law side of the calendar for trial. This case was originally begun by the plaintiff Irwin as an equity case. He filed a petition alleging that a co-partnership
2 existed between himself, Thomas Phillips, and W. R. and W. T. Cooper, and himself asked an accounting. He afterwards filed an amendment stating his cause of action in its present form. The

motion to transfer was made by him when he was the only plaintiff, and was made after the defendant W. R. Cooper had filed an equitable answer, also, in effect, asking an accounting, and that a necessary party be brought into the case for that purpose. There were both law and equitable issues presented in the pleadings, which might possibly have been separated and so tried; but the plaintiff asked to have the whole case transferred, and this the court properly refused to do, because there was a distinct equitable issue tendered by defendant, and this could not be tried to a jury.

II. The trial court found that the written contract had been superseded by an oral contract of co-partnership between C. E. Irwin, Thomas Phillips, W. R. Cooper, and T. K. Mitchell, and that the business of such co-partnership was carried on in the name of

the Cooper Mining Company. It is urged that this finding is not supported by competent evidence. We think otherwise. There was evidence offered which was incompetent to prove this fact as against the administratrix of Thomas Phillips, but there is much evidence from competent witnesses, and many facts and circumstances proven, tending to support this conclusion. The written contract itself creates a limited partnership, and the proven acts and conduct of Phillips and Irwin when at the mines, and their conduct in relation to the sale of the mill, all tend to support the claim of a partnership, and we do not feel that we ought to disturb the finding of the trial court on this question. This being the case, we think the court was right in finding that the plaintiffs had failed to sustain their cause of action as amended. The case is therefore **AFFIRMED.**

L. REINECKE (OR SIDONIA KEMLER), Appellee, v. MARTHA GRUNER *et al.*, Defendants and Appellees. JACOB BIEHL, Intervener, Appellant.

FRAUD AND WANT OF CONSIDERATION: *Burden of proof.* One attaching a fund has the burden, as against an assignee thereof who intervenes, of proving fraud or want of consideration.

Declarations of assignor. Declarations of an assignor made after the assignment, are inadmissible against the assignee.

ATTACK UPON ASSIGNMENT: *Claim arising after assignment.* An assignment cannot be attacked by one whose claim arose after the assignment.

Appeal from Dubuque District Court.—HON. FRED O'DONNELL, Judge.

TUESDAY, MAY 15, 1900.

THIS is a controversy over certain funds in the hands of one F. W. Altman, as administrator. Intervener, Biehl, filed a petition

in which he claimed to be entitled thereto under an assignment from Martha Biehl, *nee* Gruner. Plaintiff, who garnished Altman, claims that the alleged assignment was without consideration, and is fraudulent and void. The case was tried to the court, resulting in a decree finding that intervener was entitled to three hundred and fifty dollars, and the garnishee the remainder. Intervener appeals.—*Reversed.*

P. S. Webster for appellant.

H. Michel for appellee.

DEEMER, J.—From the petition of intervention and answer thereto (which are the only pleadings the record contains), and from the decree rendered by the trial court, we gather the following facts: Plaintiff commenced action aided by attachment against Martha Biehl, *nee* Gruner, and caused one F. W. Altman to be garnished as a supposed debtor of said Biehl. In that action Jacob Biehl intervened, claiming that he owned the funds in the hands of the garnishee in virtue of an assignment from Martha Biehl. Plaintiff and intervener stipulated that there was in the hands of the garnishee the sum of five hundred dollars belonging to the estate of George Gruner, and that Martha Gruner, now Biehl, was his sole heir. The case between plaintiff and intervener was tried to the court on the issues joined, resulting in a decree directing the administrator to pay intervener the sum of three hundred and fifty dollars, and the remainder to the plaintiff. Intervener is the husband of Martha Biehl, and presents as assignment, regular on its face, of the funds in the hands of the garnishee. He is therefore entitled to recover, unless it be shown that said assignment is without consideration, and is fraudulent and void. It is difficult to understand the decree rendered by the trial court. Under the issues, it should have found that intervener was entitled to the whole of the fund or to none. There was no pleading that would justify an apportionment thereof between the parties to the litigation.

The case was tried as in equity, and will be so treated in this court. Intervener, then, must have judgment for the full amount of the fund, unless the allegations of fraud or want of consideration are established, and the burden of proving this defense is on the plaintiff. It appears from the evidence that Martha Gruner was a widow when she married Biehl. She had four children by a former marriage, and before her second marriage to Biehl she entered into a written contract with him, whereby she agreed, in consideration of her prospective marriage with him, to maintain the Gruner children, and that if Biehl should expend money on their behalf she should reimburse him. In the same contract Biehl agreed he would not claim any of the earnings of the children.

After the parties entered into the marriage status, Biehl advanced for one of the children the sum of four hundred and fifty dollars, and the assignment of the funds in controversy was made in consideration thereof.

There is no evidence of any fraud in the transaction save a single written declaration made by Mrs. Biehl, and this is equivocal in character and without date. Some hearsay evidence was introduced, but it was clearly incompetent. There were
1 also some letters written by an attorney, but they were incompetent and immaterial. A letter written by Mrs. Biehl after the assignment was also produced, but, as this was a declaration of the assignor after she had parted with her interest, it cannot be considered. Moreover, there is no evidence that plaintiff held any claim against Mrs. Gruner, now Biehl, at the time the assignment was made; hence he is in no position to attack it. Intervener should have a decree finding him entitled to the fund in the hands of the garnishee, and the case is remanded for that purpose.—REVERSED.

T. K. RIDDICK v. NATHAN J. PARR, Appellant.

FRAUDULENT CONVEYANCE: *Proof of insolvency.* A judgment creditor is not entitled to set aside a conveyance by an insolvent judgment debtor, and to subject the land to the payment of the judgment, where it is not shown that other parties to the judgment are also insolvent.

Relationship—Bona fide creditors. In a suit to set aside a conveyance, as fraudulent, made by a son to his father, the relationship of the parties is proper to be considered, but not necessarily indicative of fraud; and the father, being a *bona fide* creditor, has a right to secure himself, though he knows that thereby the chances of other creditors to do so will be lessened, provided it is done in good faith.

Appeal from Buena Vista District Court.—HON. W. B. QUARTON, Judge.

SATURDAY, MAY 19, 1900.

PLAINTIFF, a judgment creditor of F. J. Parr, whom he alleges to be insolvent, brings this action in equity to set aside a deed executed by said F. J. Parr and his wife, Charlotte A. Parr, to the defendant Nathan J. Parr, conveying a certain section of land in Buena Vista county, and to subject said land to the payment of his

judgment. He alleges that said deed was executed without consideration, and for the purpose of defrauding, hindering, and delaying the creditors of F. J. Parr, and that the defendant Nathan J. Parr knew said facts. F. J. Parr and Charlotte A. Parr answered separately, disclaiming any interest in said land; and N. J. Parr answered, admitting that plaintiff holds a judgment as alleged, and denying every other allegation in the petition. Decree was rendered setting aside said deed, and charging the land with the balance due on plaintiff's judgment, "subject, however, to the right of said Nathan J. Parr to be subrogated to all the rights under the mortgage and tax lien discharged by him, and which were valid liens upon said premises prior to said pretended conveyances; and said sums so paid, amounting to eleven thousand six hundred and thirty-seven and 33-100 dollars, with interest, according to the terms of said mortgages, and six per cent. on the amount paid to discharge said taxes, and hereby declared to be a prior lien on said premises in favor of said Nathan J. Parr; and, subject to said lien in favor of said Nathan J. Parr, the said premises are hereby decreed to be subject to the lien of, and payment of, plaintiff's said judgment." From this decree the defendant Nathan J. Parr appeals.—*Reversed*.

Mack & De Land for appellant.

A. D. Bailie for appellee.

GIVEN, J.—I. It is a familiar rule of the law that, unless the judgment debtor is insolvent, the judgment creditor may not invoke the relief sought in this action. The petition shows that the plaintiff's judgment is "against F. J. Parr and others," and a "statement of facts admitted" shows that the judgment "was rendered upon three promissory notes of F. J. Parr and Charlotte A. Parr." It is alleged in the petition "that said F. J. Parr is insolvent and has no property subject to execution," and there is evidence tending to support this charge, but not of a conclusive character. Indeed, the fair inference from it is that F. J. Parr did have personal property subject to execution. We have seen that the judgment is against Charlotte A. Parr as well as F. J. Parr; yet there is neither allegation nor proof that Charlotte A. Parr was insolvent, or that she did not have property subject to execution. For aught that appears, she may have had ample property subject to execution to satisfy the balance due upon plaintiff's judgment. If it should be said that the plaintiff had established his allegation that F. J. Parr was insolvent, he certainly has failed to do so as to the other judgment debtor.

II. We think the plaintiff has failed to sustain his allegation of fraud and want of consideration in the deed sought to be

set aside. Nathan J. Parr is and was a resident of Illinois. In 1895 his son F. J. Parr visited Buena Vista county, and purchased the land in question; making a small payment thereon and further payments soon thereafter. F. J. Parr moved to Buena Vista county in 1896, and engaged in business, in the course of which he became indebted in considerable sums, including five thousand five hundred and sixty dollars to his father for borrowed money, and ten thousand eight hundred and eleven dollars secured by mortgage on the land in question. On the eighteenth of January, 1897, F. J. and Nathan J. Parr entered into a written contract whereby Nathan J. Parr purchased said section of land for the agreed consideration of twenty thousand dollars, which is conceded to be the reasonable value thereof, to be paid as follows: By assuming the mortgage on the land, to the amount of ten thousand eight hundred and eleven dollars and interest; to surrender to F. J. Parr his two promissory notes for five thousand five hundred and sixty dollars; the balance to be paid on delivery of the deed. The deed was afterwards executed and delivered, and was placed of record on the seventeenth day of February, 1897. The evidence shows, without reasonable ground for dispute, that said indebtedness of five thousand five hundred and sixty dollars from F. J. Parr to Nathan J. Parr was a *bona fide* indebtedness for money loaned. The evidence shows, without any conflict, that Nathan J. Parr paid the full amount of twenty thousand dollars as agreed, and that the surplus over and above the mortgage debt on the land and the five thousand five hundred and sixty dollars indebtedness of F. J. Parr was applied in payment of other debts of F. J. Parr. The evidence relied upon as showing the fraud alleged is that tending to show knowledge on the part of Nathan of his son's embarrassment, declarations of F. J. Parr as to what his father would do for him, and of the father as to what he would do for his son, and the fact that F. J. remained in control of the farm for a time. The relationship of the parties to the deed is proper to be considered, but not necessarily indicative of fraud. The father, being a *bona fide* creditor, had a right to secure himself, even though he knew that thereby the chances of other creditors to do so would be lessened, provided it was done in good faith. There is nothing in the statements of either Nathan or his son that shows any obligation or purpose on the part of Nathan to do otherwise than he did. While he knew that his son was embarrassed, and it was because of that embarrassment that he came to his assistance, he did not know the details or extent of his indebtedness, and, we think, believed that by taking the land he would not only save himself, but assist his son and his creditors, by avoiding delay. His desire to aid his son to pay his debts explains why he was left in control of the farm. He was left in control, that he might do just what he did do, namely, handle and

feed stock for the market, that he might pay what of his debts remained unsatisfied. We will not discuss the evidence in detail. It is sufficient to say that we think it fails to show any fraudulent intent upon the part of either of the parties to the deed, and that the consideration was full and complete, and the transaction in good faith, and without any purpose to hinder, delay, or defraud creditors. It follows from our conclusions that the decree must be reversed, and decree rendered dismissing plaintiff's petition.—**REVERSED.**

FRANK CRAWFORD V. ATHLETIC ASSOCIATION OF THE UNIVERSITY OF NEBRASKA, Defendant, AND STUDENTS ATHLETIC ASSOCIATION OF THE UNIVERSITY OF NEBRASKA, Intervener, Appellant.

NEW CORPORATION: *Jury question.* Where intervener, claiming money attached as the funds of defendant association, contended that it was a new and different association from defendant, and the evidence merely showed that the intervener
2 association was composed partly of new officers and members under another name, but organized for the same purpose as defendant, the jury were warranted in finding that such changes did not constitute the organization of a new and different association.

APPEAL: *Sufficiency of exception.* Where appellant's abstract
1 showed the only exception taken to instructions, was one "to the
3 giving of each and every one," such exception was too general to present such instructions for review.

Objection below. Where objections to the admission of evidence
1 are not made in motion for a new trial, and are presented for the first time on appeal, they will not be reviewed.

Appeal from Pottawattamie District Court.—HON. WALTER I. SMITH, Judge.

SATURDAY, MAY 19, 1900.

ACTION to recover one hundred and twenty-five dollars, with interest, balance, alleged to be due from the defendant on written contract. An attachment was issued, and under it two hundred and fifty dollars in money was seized as the property of the defendant. The defendant was not served, and no appearance made on its behalf. Intervener filed his petition, claiming to be the absolute owner of said money. The plaintiff replied, ad-

mitting "that the balance thereof [cash receipts of game] now in the hands of said sheriff is the property of this intervener, and alleging that intervener and the defendant are one and the same." The jury found as follows: "We, the jury, find for the plaintiff and against the defendant, the Athletic Association of the University of Nebraska, and that said defendant is identical with the intervener, the Students' Athletic Association of the University of Nebraska, and we fix the amount of plaintiff's recovery at \$221.67." Judgment was rendered on the verdict, and intervener appealed.—*Affirmed.*

A. W. Askwith and Wright & Baldwin for appellant.

Robertson & Kimball for appellee.

GIVEN, J.—I. This controversy arises out of the following facts: August 24, 1893, the defendant association entered into a written contract with the plaintiff "to coach, train, and instruct to the best of his ability the University of Nebraska football team during the season of 1893," and agreeing to pay him five hundred dollars therefor. Plaintiff rendered the services, and received three hundred and seventy-five dollars on account thereof. On Thanksgiving Day, 1897, a game was played at Council Bluffs by the teams of the universities of Iowa and Nebraska, and the money in dispute is of that part of the gate receipts that was to go to the association of the University of Nebraska. The claim of the plaintiff is that the association entitled to that money is the same association that is indebted to him; in other words, that the defendant and intervener are one and the same. The intervener claims that it is a new and entirely distinct and separate association other than the defendant. The case was tried and submitted upon this issue, and the jury, as it well might, found for the plaintiff thereon.

II. Appellant's first contention is that the court erred in holding as a matter of law, "in its ruling on the objections to the testimony and in its instructions," that the defendant "had a legal existence, was a legal entity, could be sued and could enter into and could make the contract with the plaintiff; and that intervener could succeed to such supposed liability of the defendant." The record fails to show that such a question was raised or ruled upon in the lower court. The appellant's abstract does not show a single objection or ruling in taking the evidence, and the exception to instructions is "to the giving of each and every one," which has been uniformly held to be too general. Appellee's abstract shows but two objections and rulings on evidence, and those as to the identity of the two associations. This contention was not made in the motion for a

new trial. This case was tried through without question as to the capacity, right, or liability of either association to sue or be sued or to intervene. It is presented in this court for the first time, and therefore, under repeated and uniform rulings, cannot be considered.

III. Appellants contend that the verdict is contrary to the evidence; but not so, we think. True, there were some changes in the officers, membership, and name of the Athletic Association of the University of Nebraska, but the jury were fully warranted in finding that they were only changes, and not the organization of a new and different association. The association, being the same, should not be allowed to avoid paying its honest debts by reason of these changes.

Complaint is made against the first and second instructions given, but, as they were not properly excepted to, the complaint may not be considered. We may add that the complaint seems to be without merit. We find no error, and the judgment is AFFIRMED.

FARMERS' LOAN AND TRUST COMPANY, Appellee, v. W. D. TURNER, Appellant, JESSIE G. TURNER AND INTER-STATE LAND AND INVESTMENT COMPANY.

PRINCIPAL AND SURETY: *Release of part of security.* Where plaintiff made a loan to defendant for his sole benefit, and received a mortgage from defendant, and also certain security from a third person, to whom defendant paid part of the money in satisfaction of his debt to him, plaintiff's release of the latter security does not affect defendant's liability.

Appeal from Woodbury District Court.—HON. JOHN F. OLIVER, Judge.

MONDAY, MAY 21, 1900.

ACTION in equity to foreclose a mortgage upon real estate. There was a decree for the plaintiff, from which defendant W. D. Turner appeals.—*Affirmed.*

Marks & Mould for appellant.

M. J. Sweeley for appellee.

SHERWIN, J.—Prior to the execution of the notes and mortgage in suit, the plaintiff held a judgment against D. H. Skinner, which it claimed was a lien upon the land covered by the mort-

gage herein. When the notes and mortgage were executed, W. D. Turner owned the land, and was negotiating a loan of twenty-five thousand dollars thereon with the Banker's Life Association of Des Moines. On the twenty-third of March, 1897, he made a written application to the plaintiff for a loan of one thousand six hundred and twenty-nine dollars and thirty-eight cents. The amount of this loan was understood by all parties to be made up of the Skinner judgment and seven hundred dollars in addition thereto, which was required to pay other incumbrances on the land before the loan could be made of the Bankers' Life Association. The loan was made by the plaintiff to Turner. Seven hundred dollars in cash was paid him, and the Skinner judgment was satisfied on the record. The mortgage securing the loan was made subject to the proposed mortgage to the Bankers' Life Association. On the same day that the notes and mortgage were executed and delivered, a written memorandum was made by plaintiff and Turner reciting the loan, the payment of the Skinner judgment, and stating that, to secure the payment of the loan, D. H. Skinner had pledged and delivered to the Farmers' Loan & Trust Company ten shares of stock in the Northern Land Company of Sioux City, Iowa, represented by certificate No. 70, issued September 1, 1891, and agreed that, "if default was made in the payment of any of said notes, * * * the stock might be sold, * * * and the proceeds applied to the payment of the notes." This stock belonged to Clara G. Skinner, mother of D. H. Skinner. It had been pledged by her as security for the note upon which the Skinner judgment was rendered. At the time D. H. Skinner undertook to pledge it as security for the loan from plaintiff to Turner it was still the property of Clara G. Skinner, and, so far as the record shows, no one had authority from her to pledge it for any purpose. Some time after this she made a demand upon the plaintiff for this stock, and it was surrendered to her. The appellant contends that this security was surrendered without his consent, that it was pledged to secure the Skinner judgment, and that the act releasing it was a breach of contract, and that he should not now be held to pay more than the seven hundred dollars which he received in cash. From the facts before us it appears conclusively that Turner made the loan of the plaintiff and paid off the Skinner judgment for his own personal use and benefit. He therefore alone became indebted to the plaintiff for the whole amount of the notes and mortgage. Neither he nor D. H. Skinner had any authority to pledge the stock of Clara G. Skinner, and, if they had, no reason is apparent to us why the plaintiff might not release a part or the whole of its security, if it so desired, without consulting Turner. We think the district court reached the right conclusion in this case, and its judgment is **AFFIRMED**.

SUSAN PARRIOTT v. D. O. BOWERS, Defendant, CYNTHIA M. BOWERS, Intervener, Appellant.

WIFE AS CREDITOR: *Evidence.* Where a levy was made on defendant's property under a landlord's attachment, and the defendant executed a mortgage on the property to his wife, prior to the term of the lease to secure the sum of \$300 which she let him have twenty-two years before, and for which she had never before demanded any note or security, the plaintiff's attachment was entitled to priority, since it is evident that there was no intention to treat the three hundred dollars as a debt until the financial embarrassment of the husband suggested it.

Appeal from Franklin District Court.—HON. D. R. HINDMAN, Judge.

MONDAY, MAY 21, 1900.

ACTION to recover rent, aided by a landlord's attachment, which was levied upon certain live stock and farm implements kept and used on the leased premises. Cynthia M. Bowers intervenes, and claims the attached property by virtue of a chattel mortgage. The case was transferred to, and heard as in equity, and a decree rendered giving plaintiff's lien priority over the mortgage of intervener. Intervener appeals.—*Affirmed.*

E. P. Andrews for appellant.

B. H. Mallory and *J. H. Scales* for appellee.

GIVEN, J.—The lease of the farm from plaintiff to defendant was executed August 21, 1896, and ran from the first day of March, 1897, to the first day of March, 1899. Defendant took possession March 1, 1897; taking with him onto the farm the property in question. On the eleventh day of February, 1897, D. O. Bowers executed to his wife, the intervener, his chattel mortgage on certain described live stock and farm implements, to secure the payment of his promissory note of same date to his wife for three hundred dollars, due February 11, 1898. This mortgage was filed for record February, 13, 1897. It is under it that appellant claims the property in question, and the sole contention is whether, under it, appellant is entitled to priority over plaintiff's landlord's attachment,—in other words, whether it is valid as against creditors of D. O. Bowers. Appellant and her husband alone testify as

to the consideration for which this note and mortgage were given, and their testimony is, in effect, as follows: That prior to their marriage, in 1871, Mrs. Bowers, then twenty-seven years of age, had accumulated three hundred dollars in money, part of which she had loaned, and that at different times within two years she let her husband have different sums of money as she received it,—in all, amounting to three hundred dollars—and that it was for this money that the note and mortgage were given. This positive testimony stands uncontradicted, and we see no reason to doubt it, but it does not necessarily follow that an indebtedness arises when husband or wife gives to the other his or her individual money. It is a frequent occurrence that wives, having separate means, give thereof to their husbands, to have and to use as their own, without any thought of thereby creating an indebtedness, and such we think is this case. No note or memorandum was made as to this money, and more than thirty-three years were allowed to pass without more than an occasional mention. Appellant says she never asked for a note before the time this one was given. Making due allowance for the fact that they were husband and wife, still their actions show that they did not regard this transaction as a loan. It was not until twenty-two years after that they treated it as a loan, and this was after Mr. Bowers had become liable on this lease, and on the same day that Mr. Bowers executed two other mortgages covering most of his property,—one to his son, and one to his son-in-law. We are satisfied that it was not intended to treat the three hundred dollars as a debt until the embarrassment of Mr. Bowers suggested it. The decree is correct, and it is therefore AFFIRMED.

CHARLES E. BALDWIN V. GEORGE H. BENEDICT *et al.*, Appellants.

RIGHT TO MAKE PARTIAL PAYMENT: *After default.* A mortgagor, entitled to pay part of the mortgage debt, and to demand a
2 release of a proportionate amount of the land “during the pendency of the mortgage,” cannot avail himself of such right after default, and after action has been commenced.

CONSTRUCTION OF CONTRACT: *Partial payment at time of sale.* At the time of the execution of a purchase money mortgage, the
1 mortgagee executed an agreement providing that, on payment of a certain sum per acre, he would release a proportionate amount of the land during the pendency of the mortgage. *Held*, that though the agreement was part of the sale, it did not apply to the amount paid when the sale was made.

Appeal from Harrison District Court.—HON. FRANK R. GAYNOR,
Judge.

TUESDAY, MAY 22, 1900.

ACTION for judgment on one promissory note for three thousand four hundred dollars executed by defendant George H. Benedict to the plaintiff, and for a decree foreclosing a mortgage on real estate executed by said Benedict and wife to secure the payment of said note. C. D. Stevens was made a defendant, but is not a necessary party to this appeal. The contentions to be considered are between the plaintiff and George H. Benedict. The issues will appear in the opinion. Judgment and decree were rendered in favor of the plaintiff. Defendant appeals.—*Affirmed.*

S. H. Cochran for appellant.

Roadifer & Arthur for appellee.

GIVEN, J.—I. On March 20, 1894, plaintiff sold to defendant a certain forty-four-acre tract of land for the agreed price of four thousand four hundred dollars, of which one thousand dollars was paid in cash, and for the balance defendant executed the note and mortgage sued upon; his wife joining in the mortgage. The defendant failed to pay the taxes on said land, wherefore, by the terms of the mortgage, the entire debt became due. The plaintiff executed and delivered to the defendant a writing as follows: "Whereas, Geo. H. Benedict has this day purchased of me the southwest quarter of the southeast quarter of section fifteen, township eighty (80), range forty-two (42), also lot numbered 'G' in the southwest quarter of the southwest quarter of section fourteen (14), township eighty (80), range forty-two (42), for the sum of forty-four hundred dollars, one thousand paid in cash in hand, and a mortgage given by the said Geo. H. Benedict and wife to secure the payment of a note for thirty-four hundred (\$3,400) dollars, dated March 20, 1894, and due March 20, 1899, on said above-described premises, I hereby agree to and with the said Geo. H. Benedict that upon the payment to me of the purchase money, to-wit one hundred dollars per acre, I will release from said mortgage such portion so paid for at any time during the pendency of the above-described mortgage. C. E. Baldwin." The whole contention is as to the effect to be given to this writing, taken as it is, or taken as plaintiff asks to have it reformed if reformation is granted. Defendant contends that said writing became a part of the note and mortgage, and that by its terms he has a right to elect to take clear of said mortgage, so much of said land

as he may see fit, by paying plaintiff one hundred dollars per acre therefor, and that, having paid one thousand dollars, he is entitled to select and take ten acres; and he offers to pay one thousand dollars more and to take ten acres therefor, and to reconvey the balance to the plaintiff. Plaintiff contends that said writing was not executed with, and is no part of, the note and mortgage; that it does not, by its terms, include the one thousand dollars cash payment, nor any payments that defendant now offers to make. Plaintiff further claims that, if said writing may be construed as claimed by defendant, it was so made by mutual mistake; that the intention of the parties was to have it provide that "in case defendant should dispose of any portion of the mortgaged premises prior to the time the mortgage was paid, then, in that case, upon the payment to plaintiff at the rate of one hundred dollars per acre for the portion so disposed of, plaintiff would release such portion;" that it was so understood and agreed for the purpose of enabling the defendant to make perfect title to any of said land he might sell before the mortgage was paid. He asks to have it reformed accordingly.

II. We are in no doubt but that said writing was executed as a part of the terms of the sale and purchase of the land, and should be so considered. It relates thereto and to nothing else, and no other purpose for its execution is apparent. While there is some evidence tending to support plaintiff's claim to a reformation, it falls short of what is required to reform a writing as plain and unambiguous as this. Reading this instrument in the
1 light of the attending circumstances, it seems to us quite clear that it does not apply to the one thousand dollar cash payment. Such would have been an unusual contract, as it would have left the plaintiff with no margin as security. A complete answer to defendant's claim is that, although the one thousand dollars were paid on the purchase price when the mortgage was executed, it was executed upon the entire tract of land. If by that payment defendant was to have ten acres of the land free from the mortgage, the ten acres would have been then selected, and the mortgage given on the balance.

It is too late, after default, and after this action was begun,
2 for defendant to come in and offer payment of a part of the mortgage debt, and demand a release of a proportionate amount of the land. It was "during the pendency of the above-described mortgage" that plaintiff had agreed to release on payments made. True, the mortgage was pending, but not in the sense meant by this contract. The judgment and decree of the district court are correct, and are AFFIRMED.

M. KINPORTS, Appellee, v. C. M. OBERHOLTZER, Appellant.

SETTING ASIDE SATISFACTION BY ATTACHMENT SALE. Where satisfaction of a judgment in attachment was entered on payment from the proceeds of a sale of the attached goods, and thereafter the holder of a chattel mortgage on such goods, executed by defendant, recovered judgment against the sheriff for the value thereof, which was paid, an application to set aside such satisfaction was properly denied.

Appeal from Pottawattamie District Court.—HON. W. R. GREEN, Judge.

WEDNESDAY, MAY 23, 1900.

APPLICATION to set aside the satisfaction of a judgment against the defendant. The application was granted. Both parties appeal.—*Affirmed.*

Wright & Baldwin and *Organ & Askwith* for appellant.

Flickinger Bros. and *John J. Hess* for appellee.

SHERWIN, J.—In January, 1892, the plaintiff sued out an attachment against the property of the defendant, and caused the same to be levied upon a stock of cigars, tobacco, and smokers' articles. January 27, 1892, this stock was sold as perishable property, for the sum of one thousand nine hundred and fifty-one dollars. March 3, 1892, the plaintiff obtained a judgment against the defendant for the sum of one thousand six hundred and eighty-four dollars and eight cents. On the fourth day of March, 1899, the sheriff, under the order of the court, paid to the clerk of the court the amount due on the plaintiff's judgment, from the proceeds of the sale of the attached property, and there was paid over to plaintiff's attorney the full amount of the judgment and prepaid costs. At the time of the levy of the attachment, and at the time of the sale thereunder, the plaintiff's father held a chattel mortgage covering the stock sold. In August, 1892, he brought suit against the sheriff for the value thereof, and in March, 1893, recovered a judgment for the full amount. Two appeals were taken to this court in that case, the last of which was disposed of in January, 1897, and the judgment against the sheriff was thereupon paid. This application is to set aside the satisfaction of the judgment entered when the proceeds of the attachment sale were applied to its payment, and is based upon the ground that the value

of the attached goods was recovered back by the defendant's mortgagee, and that plaintiff's judgment is in fact still unpaid. No one claims differently, but the defendant interposes numerous technical objections to the granting of the application. We see no merit in his various objections, and think the district court rightly set aside the satisfaction of the judgment. The order is AFFIRMED.

H. G. SEDGWICK *et al.*, Appellants, v. GEO. W. JACK, Guardian, et al.

DEEDS: *Insanity of grantor—evidence.* In an action to set aside a conveyance from a husband to his wife, it appeared that the husband was eighty-four years old and that the wife was well along in years; that the husband and one A. had had certain litigation over real estate, resulting in A.'s favor; that thereupon the wife, without other foundation for the belief, conceived the idea that A. was meditating an attack on her husband's entire property on his death, and that A. had forged deeds to her husband's lands, and was ready, on his death, to assert title thereto, that she had repeatedly pressed this idea on her husband, who was in feeble health, and prayed for strength and guidance to thwart A., and had insisted that, in order to do so, the land must be conveyed to her; that this was at last done, by the conveyance in suit, after consultation with the family lawyer; and that both husband and wife were afterwards adjudged insane, the husband dying in an asylum. *Held*, that the evidence showed the husband to have been insane at the time when the conveyance was executed.

Appeal from Van Buren District Court.—HON. T. M. FEE, Judge.

WEDNESDAY, MAY 23, 1900.

ACTION to set aside conveyances of land on account of fraud and mental incapacity of the grantor. Decree for defendants. Plaintiffs appeal.—*Reversed*.

O. C. Brown for appellants.

Mitchell & Sloan for appellees.

SHERWIN, J.—This is an action to set aside conveyances of real estate from husband to wife. It is alleged that Datus E. Sedgwick, the grantor, was of unsound mind on the eleventh day of December, 1895, when he conveyed the property in question to his wife, M.

Frank Sedgwick. At the time of these conveyances Datus E. Sedgwick was eighty-four years of age, and the wife well along in years. There had been some litigation between Datus E. Sedgwick and one Anderson over a small piece of land, prior thereto. The wife evidently conceived the idea that Anderson was maturing plans for a general assault upon her husband's estate immediately upon his death. She seems to have been entirely sincere in this belief, and to have entertained it until it became thoroughly fixed in her mind. There was no foundation for it in fact, and nothing upon which to base it, except the previous litigation between her husband and Anderson, which had been determined in favor of Anderson. She claimed that Anderson had forged deeds to all of her husband's property, and that he was awaiting his death, ready thereafter to assert title thereto. She pressed this subject upon her husband, who was in feeble health, time and again. It seems to have been the one subject in her mind for a long time. She prayed for strength and for guidance to thwart Anderson in the scheme of villany she firmly believed he contemplated, and she insisted that the way to do this was to have the title of the property transferred to her, which was done, after consultation with the family lawyer. Both of these parties were afterwards adjudged insane, and both were confined in hospitals. Datus E. Sedgwick died therein after the commencement of this action. That the wife was acting in perfect good faith in this matter, we do not doubt. Nor do we doubt that it became and was an insane delusion with her for some time before the conveyances were made. A careful examination of the evidence has led us to the conclusion that the delusion which so firmly held possession of her mind was finally participated in by her husband, and that the conveyances were the result thereof, and that they were not the acts of a sound mind. For this reason the conveyances are set aside, as prayed, and the case REVERSED.

SIMON P. HAGER *et al.*, Appellants, v. JOHN BRANDT *et al.*

PRESUMPTION OF MARRIAGE: *Grantees in deed.* A deed was executed by T. H., and signed, also, by E. H., who acknowledged it as his wife. There was some evidence that at the time of the execution of the deed he was living with her as his wife, though in fact married to another, but there is no evidence that he ever lived with the latter. The grantees and their purchasers had held and occupied the premises under the deed for over thirty years, in the belief that the woman who signed the deed was the wife of the grantor. *Held*, that without clear

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evidence of a former marriage, it would be presumed that the one with whom he lived was his wife.

Appeal from Bremer District Court.—HON. J. F. CLYDE, Judge.

THURSDAY, MAY 24, 1900.

ACTION in partition. The petition was dismissed, and the plaintiffs appeal.—*Affirmed.*

E. L. Smalley for appellants.

Sager & Sweet and *G. W. Ruddick* for appellees.

LADD, J.—In 1864 Thomas Hager acquired the forty acres of land in controversy, and in 1866 conveyed it to one Read, under whom, through mesne conveyances, the defendant Brandt claims title. The plaintiffs alleged that Hager was then married to Eva Hager, who did not join in the deed, and that they are entitled to an undivided one-third of the land, as her heirs. This deed was signed by the grantor, making his mark, and by "Elizabeth Hager," who acknowledged it before a justice of the peace as his wife. Thomas Hager and Elizabeth Romesburg lived together as husband and wife several years in Bremer county, and were so doing at the time this instrument was executed. Shortly before they left there, in 1866, Miller says, she advised him they were not married. However, they were then keeping house alone, and the record is silent as to how long their relations continued. The evidence throws some doubt on the identity of plaintiff's ancestor as the grantor of this land, but, conceding this to have been established, it utterly fails to show the existence of the marital relation between Thomas and Eva Hager at the time the deed was executed. True, Simon Hager testified that they were married, but he did not undertake to say at what time. For all that appears, it may have been after the return of Thomas to Fayette county, Pa., about 1872. We are not permitted to presume marriage from the fact of having children, especially in view of the circumstances that at that very time he was cohabiting with another woman as his wife. If presumptions are to be indulged in, they are in favor of innocence, and that Hager did not live with the Romesburg woman in a state of adultery. There is no evidence that Thomas and Eva ever lived together, and it affirmatively appears that from 1864 to the time of his death, in 1883, he lived apart from her, though in the same community. This land has been held and occupied by Brandt and his grantors for over thirty years under the well-grounded supposition that the wife of Hager joined in the conveyance to Read, and they ought not to be deprived of their property without clear

proof that she who made her mark as his wife was not such in fact, and that another, under whom plaintiffs claim, did sustain that relation then and at the time of his death. In each particular the evidence is insufficient.—AFFIRMED.

P. E. ENIX v. IOWA CENTRAL RAILWAY COMPANY, Appellant.

LOSS BY FIRE: *Expert testimony on value.* In an action for the destruction of plaintiff's dwelling house by fire emitted from defendant's engine, it was not error to admit testimony of an insurance agent as to the cost of a building similar to the one burned, where there was other evidence showing that his method of estimating such cost was approximately correct.

CROSS-EXAMINATION. Where, in an action for the burning of plaintiff's dwelling house, defendant's expert witnesses had testified to the cost of building a house the same size and dimensions as the one destroyed, it was not error to permit plaintiff to ask them on cross-examination as to the cost of a building of different size and shape from the one destroyed, since plaintiff was not bound to confine his inquiries to a building of the same proportions as that described by them in defendant's examination in chief.

MISCONDUCT OF COUNSEL. Where, in an action for the destruction of a dwelling house by fire from defendant's engine, defendant contended that the fire was the result of a defective chimney, and was not caused by defendant's engine, and there was no evidence as to the condition of the engine, the fact that plaintiff's counsel, in his argument, referred to the engines as "old fire traps" and the court, on objection thereto, stated that "he thought the remark not objectionable; that counsel had a right to call them 'fire traps,'" did not constitute prejudicial error, justifying a new trial.

ASSIGNMENTS OF ERROR: *Exceptions.* Assignments of error, based on the reception of evidence, will not be considered, where no objection was preserved below.

Appeal from Monroe District Court.—HON. F. W. EICHELBERGER, Judge.

FRIDAY, OCTOBER 5, 1900.

ACTION to recover of the defendant a loss by fire claimed to have been set by its engine. Verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed.*

T. B. Perry and N. E. Kendall for appellant.

Townsend & Mason and Bolton, McCoy & Bolton for appellee.

SHERWIN, J.—Complaint is made of the reception of testimony tending to prove the cost of a building alleged to be of different size and shape from the one burned. So far as the record before us shows, no objection was made to this testimony, and the one now presented cannot be considered. A witness, who was an insurance agent, and adjuster of losses by fire, testified, over the defendant's objection, as to the cost of a building similar to the one burned. His testimony was based upon what was called an "adjuster's rule," which figures the cost of a building at so much per cubic foot of space in the building above the foundation. The evidence of carpenters tended to show that the rule under which this witness made his estimate was approximately correct,—so determined by their own experience. The evidence was properly admitted. On the cross-examination of defendant's experts on the cost of buildings, the plaintiff was permitted to ask questions as to the cost of a building of a different size and shape from the one testified to in chief. There was no error in this. The plaintiff, in the first place, was not bound to confine his inquiries to the exact dimensions of the building under consideration on direct examination of the witness; and, in the second place, because there was testimony in the record tending to support the theory of the cross-examination; and, further, the verdict itself clearly indicates that no possible prejudice could have resulted from the cross-examination complained of, if not correct. The record does not show that the witness G. W. Stamm testified as claimed by counsel in argument, and we discover nothing in the testimony he did give which was prejudicial to the defendant.

The defendant very urgently presses its claim that a new trial should have been granted because of language used by counsel for the plaintiff in presenting the case to the jury. The statement was made and repeated that the defendant's engines were old fire traps. There was no direct testimony on either side of the case as to the condition of any of the defendant's engines, nor as to the means used to arrest sparks on the engine supposed to have set the fire in question. The burned building was situated 150 feet from the nearest point on the railroad track. The issue was squarely made that the fire was the result of a defective chimney, and was not caused by defendant's engine. There was also testimony tending to show that other fires had been set by defendant's passing trains. In view of the whole record, we reach the conclusion that the statement was not such as to require a reversal of the case. The remark of the trial court, in ruling upon an objec-

tion to this language, that he thought it not objectionable, and that counsel had a right to call them "fire traps," could not well have been understood by the jury as meaning anything more than that it was proper comment under the evidence. As the language itself was not, in our judgment, prejudicial, we think the remark of the court did not make it so, or influence the jury to the prejudice of the defendant. The verdict, both as to the cause of the fire and as to the value of the house, finds ample support in the evidence, and the case is AFFIRMED.

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Amendment—See ⁹, *post*.

Appeal Bond—See ¹³, ¹⁴, *post*.

5. **Appealable Orders**—See ²⁸, *post*—An appeal lies from an order of the superior court overruling a motion to dismiss an appeal from a justice of the peace because of the insufficiency of the appeal bond.—*Hudson v. Smith Bros.*, 411.
6. **FINAL JUDGMENT—Resubmission to Grand Jury**—An indictment against defendant for committing a liquor nuisance was set aside as defective, and judgment was entered that the cause be resubmitted to the grand jury, that the petit jury impaneled be discharged, and that defendant recover costs, from which judgment the state appealed. *Held*, that under Code, section 5448, providing that appeals can only be taken from final judgment, by the state or by the accused, the appeal should be dismissed, the

APPEAL Continued

judgment not being final, as, on a new indictment, there can be a prosecution of the case to a final judgment.—*State v. Evans*, 80.

7. **REFUSAL TO ALLOW TRANSCRIPT AT EXPENSE OF COUNTY**—Since Code, section 254, providing that if defendant in a criminal case has appealed from the judgment against him, and shall satisfy the court from which the appeal is taken that he is unable to pay for the transcript, the court may order the same at the expense of the county, is in the nature of a provisional remedy, and not a part of the criminal case itself, it is within section 4101, authorizing an appeal from an order affecting a provisional remedy, and an appeal will lie from an order refusing a transcript in a criminal case, at the expense of the county.—*State v. Wright*, 621.

Argument —See ¹, *ante*; ²², *post*,

8. **Assignments**—Assignments of error based on evidence which is not in the record cannot be considered.—*Geiser Mfg. Co. v. Krogman*, 503.
9. **AMENDING ASSIGNMENT—Dismissal**—An appeal will not be dismissed because of the filing of an amended assignment of errors more than ten days before the trial term, where appellee has already argued all the points made in such amendment, and is not prejudiced thereby.—*Hudson v. Smith Bros* 411
10. **EXCEPTIONS**—Assignments of error, based on the reception of evidence, will not be considered, where no objection was preserved below.—*Enix v. Iowa Central Ry. Co.*, 748.
11. **How SPECIFIC**—Under Code, section 4136, requiring an assignment of error to clearly indicate the very error complained of, and requiring the points in a demurrer, motion, instructions or rulings on which the party relies to be separately stated, an assignment that “the court erred in overruling plaintiff’s motion in arrest of judgment and for a new trial, and the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 10th grounds of such motion, in that the verdict is contrary to law, to the evidence; damages are waived; the instructions are wrong; that the verdict is the result of prejudice, and plaintiff’s motion to direct a verdict should have been sustained,”—will not be considered, since it is too general to present any error for review.—*Geiser Mfg. Co. v. Krogman*, 503.

APPEAL. Continued

Attorneys—See ¹³, ¹⁴, ⁴⁴, *post*.

12. **Board of Supervisors**—NOTICE OF APPEAL—A notice of appeal from a decision of a Board of Supervisors, to the district court, which recited that it was from the action of the board rendered January 27, 1898, in the matter of the selection of papers for the county printing, was a sufficient designation of the order appealed from.—*Young v. Rann*, 253.

13. **Appeal and Writ of Error**—Under Code, section 441, providing a method for the selection of the newspapers to do the county printing and allowing an appeal from a decision of the Board of Supervisors in making such selection, to the district court, such appeal need not be taken by writ of error, but may be by appeal as from a justice court.—*Idem*.

Correction of Record—See ²⁹, *post*.

Demurrer—See ⁵⁴, ⁵⁵, *post*.

Estoppel—See ³⁹, *post*.

Evidence—See ³², ³³, ³⁹, ⁵⁶, *post*.

Exceptions—See ³⁴, ⁴⁰, *post*.

Final Judgment—See ⁶, *ante*; ⁵², *post*.

Judges—See ²⁸, *post*.

Jurisdiction—See ¹⁴, ²⁰, *post*.

Instructions—See ⁴¹, ⁴², ⁴³, ⁴⁴, ⁴⁷, ⁵³, *post*.

14. **Justice's Court — Attorney as Bondsman**—An attorney in active practice is not competent to serve as surety on an appeal bond given on appeal from the judgment of a justice of the peace.—*Hudson v. Smith*, 411.

15. **Jurisdiction**—Since a person cannot be surety for himself, an appeal bond signed by a judgment defendant and an attorney in active practice on an appeal from a justice's judgment to the superior court is not sufficient to give the superior court jurisdiction.—*Idem*.

Justice of the Peace—See ¹⁴, *ante*.

Justice Supreme Court—See ²⁸, *post*.

Motion and Demurrer—See ¹⁷, ²¹, ²⁵, *post*.

16. **Notice of Appeal**—See ⁹, *ante*—UPON CO-DEFENDANT—*When not Required*—Under Code, section 4111, providing that, where one or more of several plaintiffs or defendants appeal, notice thereof shall be served on the rest of the parties to the action, it is not necessary for a defendant appealing from

APPEAL Continued

- a judgment to serve notice on a co-defendant who made no contest in the trial court, and took no appeal from the judgment rendered therein, as such co-defendant has no interest which can be affected by the decision of the appellate court.—Ward v. Walker, 611.
17. **Objection Below — ACTION IMPROPERLY BROUGHT.**—Objection that a cause of action against the estate of one deceased is not properly brought must be raised by motion or demurrer, and cannot be raised for the first time on appeal.—Easton v. Sommerville, 164.
18. **Prematurity**—Where the objection that an action was prematurely brought was not raised in the trial court, a judgment for defendant will not be affirmed for such reason, where there was reversible error in the record.—Petty v. Mutual Fire Ins. Co. 358.
19. **CERTIFICATION**—An objection to the certification of a record by the trial judge, which does not point out its insufficiency, will not be considered on appeal.—Shropshire v. Ryan, 677.
20. **ELECTION OF REMEDIES**—Objection that plaintiff elected one remedy, and is estopped from pursuing another, cannot be made for the first time on appeal.—Easton v. Sommerville, 164.
21. **EVIDENCE**—Where objections to the admission of evidence are not made in motion for a new trial, and are presented for the first time on appeal, they will not be reviewed.—Crawford v. Asso. 736.
22. **INTERVENTION**—Objection that intervention was not timely cannot be made for the first time on appeal.—Hitt v. Sterling-Goold Mfg. Co. 458.
23. **JUDGE**—Where objection to another judge of the district, acting for the trial judge at the latter's request in the withdrawal of erroneous instructions, is not made in the trial court, it cannot be presented for the first time on appeal, the question involved not being a jurisdictional one.—Renner Bros. v. Thornburg, 515.
24. **MISJOINDER**—Objection to misjoinder of parties and causes of action cannot be made for the first time on appeal.—Easton v. Sommerville, 164.
25. **MOTION IN ARREST**—Where the question as to the sufficiency of the petition was not raised by motion in arrest of judgment

APPEAL Continued

ment, it will not be considered on appeal.—Dubuque Lumber Co. v. Kimball, 48.

26. PLEADING—On appeal, a party will not be awarded relief not claimed in the petition, and asked for on a theory advanced for the first time on appeal.—Miner v. Rhynders, 725.
27. *Same*—Where in a suit to set aside conveyances of land as in fraud of creditors, the grantee did, in the district court, not plead liens alleged to be superior to plaintiff's rights, he cannot urge such question on appeal.—Joyce v. Perry, 567.

Original Notice—See ⁴⁶, ⁴⁷, *post*.

Parties—See ⁴⁶, ⁶⁰, *post*.

Pleading—See ³⁸, ³⁷, *ante*; ⁴⁴, ⁶⁰, ⁶¹, *post*.

28. Pending Appeal—AUTHORITY OF JUSTICE OF SUPREME COURT—*Supersedeas*—An order restraining a proceeding to collect a judgment, pending an appeal, upon the filing of a bond, was properly made by one of the judges of the Supreme Court, where, without the order, the objects of the appeal would be defeated, though the statute provides for no such order.—Norris v. Tripp, 115.
29. CORRECTION OF RECORD—*Separate Appeal from Essential*—Where, after appeal, appellee moved for a correction of the record in the lower court, and such motion was granted over appellant's objections, and appellant then moved the supreme court to strike appellee's amended abstract, showing the correction, from its files, the latter motion will be overruled, since a separate appeal from the action of the lower court in correcting the record would be necessary, in order to a review of error therein. (Compare Culbertson v. Salinger et al, page 447 *ante*). REPORTER.—Renner Bros. v. Thornburg, 515.
30. SUPPLEMENTAL DECREE—*Jurisdiction*—In an action to quiet title after an appeal is taken to the supreme court from a decree of the district court in favor of plaintiff, and giving him a day within which to pay money found due to defendant, the district court has no right to proceed in the case, and render a supplemental decree in favor of defendant for plaintiff's failure to pay the money within the time.—Stillman v. Rosenberg, 369.

Prejudice—See ⁶¹, *post*.

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APPEAL Continued

31. **Reversal and Remand**—In a suit to redeem from tax sale, where plaintiff offers to take a decree setting aside the sale, without requiring defendants to account for rents and profits, such decree will be entered and, upon reversal resulting, it is proper for the supreme court to order such decree, with permission to defendants to present claim for improvements to the district court for allowance.—*Hall v. Cardell*, 206.
32. **Review**—See ^{8, 10, 11, 17} to ²⁶, *ante*; ^{32, 33} *post*.—On appeal, matters not discussed in argument will not be reviewed.—*Iowa Brick Co. v. City of Des Moines*, 272.
33. **EVIDENCE—Construction on Appeal**—Where a building was erected under a trust agreement, and the record on appeal, in an action to recover money retained as liquidated damages for delay, contained no showing as to the terms of the trust, except a statement by one witness that the building was erected as “an old men’s home,” the supreme court cannot determine the bearing which the trust and its provisions had on the issue whether the amount retained was intended by the parties as liquidated damages or a penalty.—*Kelly & Mahon v. Fejervary*, 693.
34. **Denial of Transcript**—The denial by a court of a transcript at the expense of the county, the furnishing of which transcript is authorized by Code, section 254, in cases where a defendant is unable to pay for one, is not conclusive, and the findings leading to such denial may be reviewed on appeal.—*State v. Wright*, 621.
35. **Exceptions**—Exceptions to rulings, which are not argued, cannot be considered on appeal.—*McGuire v. Keneflick*, 148.
36. **Unobjected Testimony**—Where the widow of one deceased brought partition, and a son claimed title by virtue of an oral agreement with deceased, his testimony as to dealing with deceased, received without objection, though incompetent under Code, section 4604, must be considered as part of the evidence, on appeal.—*Chew v. Holt*, 362.
37. **Sufficiency**—Where appellant’s abstract showed the only exception taken to instructions, was one “to the giving of each and every one,” such exception was too general to present such instructions for review.—*Crawford v. Asso.* 736.

APPEAL Continued

38. *Same*—Where an exception is not taken at the time, to the court's instructions, defendants' argument in support of a motion in arrest of judgment, made within three days after verdict, not specifying instructions of the court as erroneous, nor excepting to any part of the charge to the jury, will not be regarded as the exception required by law; hence the instructions will not be reviewed on appeal.—*American Sav. Bk. v. Shaver Car. Co.* 137.
39. *Estoppel*—An appellant is not precluded from taking advantage of exceptions taken to incompetent testimony, although he has introduced similar testimony in his own behalf.—*Richardson v. Webster City*, 427.
40. *EXCEPTION*—Under Code, section 3749, requiring an exception to be taken at the time a decision is made, unless it be on motion or demurrer, where defendant did not take an exception at the time of the decision, but two days later filed his exceptions, and a motion to have them entered with the district court clerk, which motion was submitted to the judge, and sustained, an appeal based on an exception so taken will not be reviewed.—*Young v. Rann*, 253.
41. *INSTRUCTIONS*—Mere prolixity in instructions given at the jury's own request, and a want of clearness not sufficient to mislead them, is not error.—*Renner Bros. v. Thornburg*, 515.
42. *Same*—Where a requested instruction which was refused is abstractly correct, but refers to evidence which is not in the record, it will not be considered on appeal.—*Geiser Mfg. Co. v. Krogman*, 503.
43. *Equivalents*—Where an issue is fully covered by instructions already given, a refusal to give a correct instruction thereon is not error.—*Sanders v. O'Callaghan*, 574.
44. *Issue not Pleaded*—Where the question as to plaintiff's right to prosecute the action was not raised in the pleadings, it will not be considered on appeal.—*Dubuque Lumber Co. v. Kimball*, 48.
45. *Misconduct of Counsel—Preservation for Appeal*—Where the taking of opening statement of counsel by the reporter was waived and the statement not preserved by a bill of exceptions, such statement cannot be reviewed on appeal.—*State v. Keenan*, 286.

APPEAL. Continued

46. ORIGINAL NOTICE—*Defective Copy Served*—Where, in a suit to enjoin a liquor nuisance, a default against the owner of real estate was set aside, and the petition dismissed as to him, on the ground that the amended return of the sheriff showed that the copy of the original notice delivered to him did not contain a description of the real estate contained in the notice, and it does not appear on appeal what the original notice did contain, the decree will be affirmed.—*State v. Gifford*, 648.
47. Void Notice—*Acceptance of Service*—Acceptance of service of an unsigned notice of appeal does not estop from insisting on the defect, as such notice is jurisdictional, an unsigned notice being no notice and the supreme court acquiring no jurisdiction without such notice, though there be consent of parties.—*State Sav. Bk. v. Ratcliffe*, 662.
48. PARTY NOT APPEALING—Where defendant has not taken an appeal, the supreme court, on an appeal by plaintiff, will not consider the action of the trial court in suppressing certain depositions taken by defendant.—*Carter v. Fred Miller Brew. Co.* 457.
49. Same—Where defendant in partition claimed sole ownership and former adjudication, and judgment was found against her on the former branch of the case, from which she does not appeal, her claim cannot be considered on an appeal by plaintiff.—*Noy v. Noy*, 161.
50. Successful Party—A finding in favor of a successful party cannot be considered on his appeal, except to sustain the final conclusion arrived at below.—*Young v. Rann*, 259.
51. PREJUDICE—Though the appeal record in an action against a decedent's estate showed that an objection had been made and sustained to the testimony of plaintiff's wife at the close of her direct examination, on the ground that she was incompetent to testify to personal transactions with the decedent, yet where her testimony was permitted to stand, and the ruling was not made effective, plaintiff showed no prejudice thereby.—*In re Myers Estate*, 584.
52. Second Submission—DEFECT IN PLEADING—*Waiver on First Submission*—Where a petition prayed for specific performance and general relief, and the answer alleged an accounting and cancellation of the contract, which cancellation was admitted and accounting denied by the reply, and the case was tried on the theory of a full accounting, and on a first sub-

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APPEAL Continued

mission defendant raised no question of the sufficiency of the pleadings to warrant an accounting, but denied the accuracy thereof, such defendant is estopped on a second submission of the same appeal to question the sufficiency of the pleadings to justify an accounting.—*Shropshire v. Ryan*, 677.

Supersedeas—See ²⁸, *ante*.

Supplemental Decree—See ³⁰, *ante*.

53. **Time for Appeal**—**COMMISSIONER'S REPORT**—*Final Judgment*—Where, in an action involving a money demand, a finding is made for plaintiff, and commissioners are appointed to ascertain the amount due, the time within which appeal may be taken will be computed from the date of the commissioners' report; the judgment not being final until such report is received.—*Baird v. Omaha & C. B. R. & B. Co.*, 627.

Transcript Allowance—See ⁷, ³⁴, *ante*.

54. **Waiver**—**DEMURRER**—*Pleading Over*—Where plaintiff's demurrer to defendant's answer is *overruled*, and exception taken, and plaintiff then files a reply to the answer, he thereby waives his right to complain of the overruling of his demurrer, on appeal.—*Adams v. Holden*, 54.
55. *Same*—While overruling a demurrer to an answer is not an adjudication, and the matters covered by such ruling may thereafter be presented in other ways, yet when, after such ruling, the party interposing the demurrer pleads over, he waives the error in the ruling and cannot base an assignment of error upon it.—*Gelser Mfg. Co. v. Krogman*, 503.
56. **EVIDENCE BELOW**—Where plaintiff's petition was dismissed because proper notice had not been served on the city of the injury alleged to have been occasioned by a defective sidewalk, a second averment in the petition that the injury was due to improper lighting of the street will not be considered on appeal as dispensing with the necessity of notifying the city of the injury, where no evidence was introduced at the trial to sustain such averment.—*Giles v. City of Shenandoah*, 84.
57. **INSTRUCTIONS**—Case will not be reversed for failure to charge the jury on an issue which was waived in the court below.—*Bradley v. Ia. Cent. Ry. Co.*, 562.

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APPEAL Continued

TO

ASSIGNMENT

58. *Instruction Asked*—Where a party has requested an instruction of the trial court embodying practically the same thought as one given by the court, he cannot complain on appeal of the giving of the latter.—*Renner Bros. v. Thornburg*, 515.
- 59 *Same*—Where the evidence submitted on the question of defendant's ratification of his signature to a note is conflicting, and plaintiff has requested an instruction submitting the issue to the jury, he cannot complain on appeal that the court should have instructed, as a matter of law, that defendant had ratified the signature.—*Idem*.
- 60 PLEADING BELOW—The original petition having based plaintiff's claim on a written contract, and the answer having in addition to a general denial, denied that M. "Agreed to pay or assume the payment of the several notes described in the petition," and the case having proceeded on the theory that defendant's denial went to the amendment made by plaintiff, near the close of the trial, to the effect that the agreement was in part written and in part oral, the denial will be so treated on appeal.—*Culbertson v. Salinger*, 447.
61. *Estoppel*—Testatrix bequeathed her estate to her daughter, who was to care for her father during his life; and the father elected to take under the will in lieu of his rights at law. Suit was brought by the daughter to enjoin a sale of the land under an execution against the father. She contended on appeal that her father had no interest in the land subject to execution, because of his election, and was thereby estopped to set up a dower interest, but no estoppel was pleaded in the trial court. *Held*, that, as there was no plea of estoppel, the question could not be considered on appeal.—*Brightman v. Morgan*, 481.

Writ of Error—See ¹⁸, *ante*.

ARSON—See CRIM. LAW, ², ².

ASSIGNMENT—See CONTRACTS, ²; CORPOR., ¹.

1. BY ONE WITHOUT KNOWLEDGE OF DEFENSE—*Assignee with Knowledge*—The fact that when one purchased paper he was informed that the person who signed it claimed not to be personally liable thereon cannot avail the latter when sued thereon, where such purchaser's assignor had the right to enforce such personal liability.—*Riegel v. Ormsby*, 10.

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ASSIGNMENT Continued

TO

ATTORNEYS' FEES

2. **ATTACK UPON ASSIGNMENT—*Claim Arising After Assignment***—An assignment cannot be attacked by one whose claim arose after the assignment.—*Reineke v. Gruner*, 731.
3. **DECLARATIONS OF ASSIGNOR**—Declarations of an assignor made after the assignment, are inadmissible against the assignee.—*Idem*.

ATTACHMENT LEVY—See FRAUD, ¹; STAT. LIM., ¹⁴

1. **Corporate Stock — TRANSFER—*Record***—Under Code 1873, section 1078, providing that transfers of corporate stock shall not be valid until entered on the books of the corporation, a transfer of stock is not valid, as against creditors having actual notice thereof, even in a case where the assignee requested the proper corporate officer to record the transfer, but he failed so to do.—*Idem*.
2. **Lands—*Priorities***—Where a sheriff, on August 5, 1896, in levying an attachment on land, made an entry in the incumbrance book, reciting the fact of the levy, and made such return on a writ of attachment, and notice of the levy was not given to defendant until August 10, 1896, he not being at home, the lien created by the levy attached to the land when the sheriff indorsed the fact of the levy on the writ of attachment, and the lien is superior to liens created by mortgage given by defendant on August 6, 1896, and confession of judgment made on August 7, 1896.—*Schoonover v. Osborn Bros.*, 140.
3. **NOTICE OF LEVY**—Under Code 1873, section 2967, providing that stock and interest owned by defendant in any company may be attached by giving notice of the attachment to defendant, notice of an attachment of land is not necessary to the validity of the attachment, but only to complete the levy.—*Idem*.
4. ***Reasonable Time for Notice***—As a notice to defendant of a levy on land under an attachment is not necessary to the validity of the attachment, but only to complete the levy, notice given to defendant five days after the levy, is given in reasonable time.—*Idem*.

ATTORNEYS—See ACCOUNTING; APPEAL, ¹⁴.**ATTORNEYS' FEES**—See CONTRACTS, ⁶; INTOX. LIQ., ⁸.

1. **Separate Notes**—Under, Code, section 3869, providing that in an action on a written contract providing for attorney's

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ATTORNEYS' FEES Continued

TO

BOARD OF HEALTH

fees the amount allowed shall be fixed according to a specified graduated scale, where a judgment was entered on several notes declared on in separate counts of a petition and executed at different times, it was proper to compute attorney's fees on each note separately, rather than on the total amount of the notes, though by such method of computation the allowance was increased.—*Bankers' I. S. B. v. Jordan*, 324.

2. RETURN DAY—The second day of the term for which a suit is brought is return day, within Code, section 3869, providing that one-half the amount specified therein for attorney's fees shall be allowed if the money sued for is paid before return day, and three-fourths if paid after return day.—*Idem*.
3. RETAXATION OF COSTS—Code, section 3862, providing that the clerk may tax certain costs, and any other sum which the court may have awarded as costs, includes the taxing of attorney's fees, and hence they may be retaxed by the court, on motion.—*Idem*.

BANKS—See TRUSTS, ⁴.

BASTARDS—See CRIM. LAW, ²³.

Recognition—*Sufficiency*—Statements, made by one charged with being the father of a child born out of wedlock that he had a boy somewhere, that the mother of the boy had been ruined by him, that the mother was pregnant, and that he was going to send her money, did not constitute the general and notorious recognition of the child necessary under the statute, to entitle it to inherit from the father.—*McCorkendale v. McCorkendale*, 314.

BOARD OF HEALTH.

1. Jurisdiction—*Right to Transfer Infected Persons*—Code, section 2568, provides that the mayor and city council shall constitute a local board of health, within the limits of their cities, and shall have the power to establish quarantine against all diseases dangerous to the public. Section 2570 provides that a local board of health may make such provisions as are best calculated to preserve the inhabitants from danger. *Held*, that section 2570 did not enlarge the territorial limits of a board of health's jurisdiction as prescribed by section 2568, nor authorize a city board of

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BOARD OF HEALTH Continued

TO

BOUNDARIES

health to transfer one affected with a dangerous disease to the jurisdiction of another board.—*Warner v. Stellins*, 86.

2. **RIGHT TO INJUNCTION**—Code, section 2568, provides that the trustees of any township shall constitute a local board of health within the limits of the township, and shall have power to establish quarantine against dangerous diseases. *Held*, that where a city was about to establish a pest house on land owned by it in a township, and convey patients thereto, the trustees could restrain such action, without proof that the city was about to create a nuisance. The right to enjoin rests upon the power given local boards of health to protect their territory from infection.—*Idem*.
3. **POLICE POWER—Conflict With Corporate Rights**—Code, section 2568, provides that the mayor and city council of each town or city, and the trustees of any township, shall constitute a local board of health, within the limits of their towns, cities or townships, and shall have power to establish quarantine against all diseases dangerous to the public. Section 880 provides that cities may acquire and hold ground outside of their limits for hospital purposes. *Held*, that under section 2568 the trustees of a township had power to restrain a city from establishing a pest house on land owned by the city in the township, since the health regulations of the state were a part of the police power, and if their enforcement abridged private or corporate rights, such rights must yield to the public good.—*Idem*.

BOUNDARIES.

1. **By Recognition** — A division line between adjoining tracts, definitely marked by the maintenance of a fence recognized by the owners as such division line, and up to which they have cultivated the land on either side for more than ten years is the true boundary line between them.—*Miller v. Boone County*, 654.
2. **ACQUIESCENCE AS EVIDENCE**—Acquiescence in a marked line as forming the boundary between adjoining owners furnishes some evidence that it is the true line, but its weight is dependent somewhat on the period of acquiescence.—*Idem*.

BREACH OF CONTRACT—See DAMAGES, ¹, ², ³,

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BREACH OF PROMISE

TO

CONST. LAW

BREACH OF PROMISE—See EVID , ¹⁹; JUDGMENT ²², ²³.

Evidence—In an action for the breach of a marriage promise, proof of three engagements and the bearing of two children to defendant is sufficient evidence of plaintiff's affections to warrant an instruction that if plaintiff's affections were implicated, and she had become attached to defendant, the wound and injury to affections should be compensated for.—*Stewart v. Anderson*, 329.

BURDEN OF PROOF—See FORECLOSURE, ²; FRAUD, ⁶; MECH. LIEN, ³; MORTG., ²; TRUSTS, ².

BURGLARY—See CRIM. LAW, ⁴ to ⁹.

CITIES AND TOWNS—See DEDICAT., ²; MUN. CORP.

CLAIMS—See JUDGMENTS, ¹, STATUTE OF LIM., ².

CONSIDERATION — See CONTRACTS, ², ⁴, ¹⁷; FRAUD, ⁶; FRAUD. CONVEY., ².

CONSPIRACY—See FRAUD. SALE, ¹.

CONSTITUTIONAL LAW.

1. **Default Judgment**—Revised Statutes Wisconsin, section 2890, authorizing the clerk of the court to enter judgment in certain default cases, is not in conflict with the provision of the Wisconsin constitution vesting the judicial power in certain courts, as the judgment is to be treated as rendered by the court.—*Fred Miller Brew. Co. v. Ins. Co.*, 590.
2. **Special Privileges**—Code, section 2508, prohibits the use of petroleum products for illumination which emit a combustible vapor at a lower temperature than 105 degrees Fahrenheit, closed test, except when used in the Welsbach hydrocarbon incandescent lamp. *Held*, that since there were other lamps equally safe, operated on the same principle, and securing the same results as the Welsbach lamp, the exception contained in such section was unconstitutional, as a violation of Constitution, Article 1, section 6, prohibiting the general assembly from granting to any citizen or class of citizens privileges or immunities which shall not equally belong to all citizens on the same terms.—*State v. Santee*, 1.
3. **ABRIDGEMENT OF PRIVILEGE OR IMMUNITY**—Such provision is also in violation of U. S. Constitution, Article Amendment 14, section 1, forbidding a state to pass a law abridging the privileges or immunities of citizens, or denying to its citizens equal protection of the law.—*State v. Santee*, 2.

CONST. LAW Continued

4. **CONSTRUCTION**—Though an interpretation which will render a statute not obnoxious to the Constitution will be adopted if possible, this rule of construction does not warrant the forcing on the language of an act a meaning which upon a fair test is repugnant to its terms, nor taking from or adding to the plainly expressed language of the legislature.—*Idem*.
5. **Interpretation of Foreign Constitution and Statutes**—In the interpretation of the statutes and constitution of a sister state the courts will follow the decisions of the court of last resort of such state.—*Fred Miller Brew. Co. v. Ins. Co.*, 590.
6. **Peddler's Tax**—**EXEMPTION OF UNION SOLDIERS FROM**—Under Constitution, article 1, section 6, providing that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Code, section 1347, requiring all peddlers plying their vocation outside of any city or town to secure a license from the county auditor, and to pay a tax therefor, but specially exempting from the payment of such tax persons who have served in the Union army or navy, is unconstitutional and void, as an unreasonable classification.—*State v. Garbroski*, 496.
7. **Statutes**—Acts Twenty-seventh General Assembly, chapter 48, amending Code, section 1898, and providing that such section shall govern all contracts between building and loan associations and other parties made before the Code took effect, and that such contracts shall be construed and enforced in actions and proceedings as therein provided, with the same effect as if made after the Code took effect, is not expository legislation, but curative merely.—*Fisk v. C., M. & St. P. Ry. Co.*, 402.
8. **STATUTE VOID IN PART**—Code, section 2508, prohibits the use of petroleum products for illuminating purposes which emit a combustible vapor at a lower temperature than 105 degrees Fahrenheit, closed test, except when the gas or vapor is generated outside the building to be lighted, but provides that such provision shall not apply to such petroleum products used in the Welsbach hydrocarbon incandescent lamps. *Held*, that though such special exception

CONST. LAW Continued

TO

CONTRACTS

was unconstitutional and void, as a special privilege, its invalidity did not invalidate the whole act, since such exception was not necessary to the completeness of the general prohibition of the statute.—State v. Santee, 2.

9. TITLE 161—The title to Acts Twenty-seventh General Assembly, chapter 48, enacted as a curative act of Code, section, 1898, regulating building and loan associations, and entitled “An act to amend section 1898 of the Code relating to building and loan associations,” being plain, broad, and directing attention to the general subject of such associations, is not in violation of Constitution, Article 3, section 29, requiring the subject of the act to be plainly expressed in its title.—Fish v. C., M. & St. P. Ry. Co., 402.

CONTEMPT—See WITNESSES, ¹.

CONTRACTS—See INSURANCE, ⁶, ¹², ²⁰; INTOX. LIQ., ¹; WARRANTY, ¹, ²; SCHOOLS, ¹.

1. Acceptance—RIGHT OF ACTION—Under a contract to sink a well of sufficient depth to insure an ample supply of water for four hundred head of stock, its sufficiency to be tested by “the continual pumping of water for seventy-two hours,” and providing for payment of the stipulated price by the parties upon their acceptance of the well, “as being satisfactory to them,” an action for services in sinking the well cannot be maintained until the test provided for has been made or waived, and the well accepted.—Barnes v. Rawson, 426.
2. Assignability—Where a corporation owning land subject to a mortgage entered into certain contracts with defendant, and agreed to hold the land in trust, and to sell, collect, and pay over to defendant a certain proportion of the proceeds arising from the sale thereof, less the amount of the mortgage, on his agreement to pay \$1,000 on each contract taken out by him, and a pro rata share of survey and grading expenses, such contracts were assignable; and a pledge thereof by the corporation as collateral to the mortgage, or its failure to pay the same, under an agreement that it would collect and pay the balance due on such contracts to the mortgagee, to be applied on the mortgage, constitutes a valid assignment thereof.—Dorr v. Alford, 278.
3. Consideration—Where one is induced to purchase stock of a corporation by reason of an oral agreement of another to

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CONTRACTS Continued

take such stock from him whenever he should desire, and to pay him therefor what the same had cost, and, afterwards, on request of the purchaser that the stock be taken off his hands, such other person orally agrees that if the purchaser will release him from his first agreement, and permit him to vote the stock by proxy, he will save the purchaser harmless from any liability on account of such investment, the release from the first agreement, though it be within the statute of frauds, and the right to vote the stock, are a sufficient consideration to support the second.—*Merchant v. O'Rourke*, 351.

4. **SAME**—The detriment to the promisee is a sufficient consideration to support an obligation purchased on the strength of the promisor's execution thereof, as against the latter, even though he received no consideration.—*Riegel v. Ormsby*, 10.
5. **Construction**—The recital in the last clause of an instrument, "This agreement shall not become operative till the said M. shall sign certain notes, heretofore agreed upon, as surety for S.," does not mean that an independent agreement existed, binding M. to sign the notes, but only that the identity of the notes referred to had been settled by agreement.—*Culbertson v. Salinger*, 447.
6. **SAME**—Where a corporation owning land subject to a mortgage agreed with defendant to hold in trust, and to sell, collect, and to pay over to him a certain proportion of the proceeds, on his agreement to pay \$1,000 in installments, defendant was not entitled to demand a conveyance of any portion of the lands, but only to share in the proceeds arising from the sale thereof.—*Dorr v. Alford*, 278.
7. **COURT AND JURY**—A written contract provided for the sale of a stock of merchandise, except dry goods and men's overcoats. An invoice was made by certain selected persons. *Held* that, in the absence of a provision making the decision of the invoicers as to what articles the term "dry goods" included final, the court was authorized to determine what articles were included in that term.—*Wood v. Allen*, 97.
8. **Same**—Where, in an action to recover damages retained for delay in completing a building under a clause of the contract providing for liquidated damages, the evidence puts in issue the intention of the parties in using such clause,

CONTRACTS Continued

the question of the parties' intention is for the jury and not for the determination of the court.—Kelly & Mahon v. Fejervary, 693.

9. OF LEASE—*Jury Question*—Defendant leased for five years from plaintiff a sawmill property, including all personal property "now in use in the mill and on the premises," and also all horses and wagons, harness, carts, etc., "now used by" plaintiff. No provision was made for its disposition at the termination of the lease, but at the end of the term a settlement was endorsed on the lease. Three days after the lease was executed an additional contract was entered into between the parties, specifying certain horses, wagons, and harness furnished by plaintiff to defendant, and providing that "similar property in value to be returned at the end of this lease." *Held*, that whether the property specified in the contract was that included in the lease, so as to be included in the settlement, was for the jury.—Dubuque Lumber Co. v. Kimball, 48.
10. *Same*—Where property was furnished by plaintiff to defendant under a contract providing that "similar property in value to be returned at the end of this lease at the joint expense of these parties," an instruction that plaintiff should be allowed one-half of the value of the property, as fixed at the time of the contract, "after deducting therefrom two horses and three cows," is error, since it is the *value* of the horses and cows at the time of their return which is to be deducted.—*Idem*.
11. LIQUIDATED DAMAGES—Where a building contract provided that in case of delay the contractor should pay a certain amount for each day's delay as liquidated damages, but contained nothing from which it could be determined as to whether the sum to be retained was intended by the parties as liquidated damages or as a penalty, evidence of conversations had at the time and just previous to the execution of a contract between the parties and their agents was not inadmissible as tending to contradict the written instrument, for such evidence did not tend to contradict the instrument, but merely to explain what was intended by the expression "Liquidated Damages."—Kelly & Mahon v. Fejervary, 693.
12. PARTIAL PAYMENT AT TIME OF SALE—At the time of the execution of a purchase money mortgage, the mortgagee ex-

Small figures refer to subdivisions of Index. The others to page of report.

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cuted an agreement providing that, on payment of a certain sum per acre, he would release a proportionate amount of the land during the pendency of the mortgage. *Held*, that though the agreement was part of the sale, it did not apply to the amount paid when the sale was made.—Baldwin v. Benedict, 741.

13. **UNDERSTANDING OF PARTIES**—It is proper to instruct that, if the parties intend the terms of a written contract to be taken in a sense different from their ordinary one, that sense is to prevail against either party, in which he had reason to suppose the other understood its terms.—Wood v. Allen, 97.
14. **Expiration of Contract**—Defendant, being indebted to a bank, entered into an agreement with it, whereby he agreed to purchase horses with funds to be furnished by the bank, and resell the same, and turn the proceeds over to the bank, it to have title to the horses, until resold, and to apply the profits of such transactions to the payment of defendant's indebtedness. After the indebtedness was paid, defendant continued to borrow of the bank, and later entered into partnership with plaintiff, and bought and sold horses. *Held*, that the object of the original agreement with the bank having been accomplished, it thereafter had no lien on horses purchased by the firm, in part, with money borrowed by defendant from the bank.—Miner v. Rhynders, 725.
15. *Same*—Plaintiff furnished defendant funds to purchase a quartz mill to be used in Arizona, and, in consideration, took an interest in mining claims, with the agreement that if the venture should prove a failure or plaintiff desired to withdraw, defendant should be responsible for the money paid on the mill, less any sums received by plaintiff as profits in the business. Plaintiff went to the mine in Arizona, paid off the workmen, and furnished considerable money in addition to that furnished under the contract. A bill of sale was given to a son of the plaintiff without consideration, and he took charge. The venture was a failure. *Held*, in an action to recover on the contract, that the evidence was sufficient to support a finding that the written contract had been superseded by an oral contract of co-partnership, and hence plaintiff was not entitled to recover.—Irwin v. Cooper, 728.

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16. **Merger—*Compensation of Attorney***—An attorney made an agreement with his client, whose property was covered by mortgages and in litigation, to represent him, and obtain a loan to pay off the incumbrance, for which services he was to receive one-third of the property saved to the client. Afterwards, the litigation having ended adversely, the attorney, having failed to obtain the loan, purchased the client's equity in the property, giving notes for the same, and agreeing to pay the incumbrances, and that the notes should be the client's absolutely. *Held*, that the first contract was superseded by the second, and hence, in an action on the notes, no credit could be allowed the attorney for services rendered during the litigation.—*Brown v. Curtis*, 542
17. **Mutuality and Consideration**—Where one is induced to purchase stock of a corporation by reason of an oral agreement of another to take the stock from him whenever he should desire, and to pay him therefor what the same had cost, such agreement is not invalid for want of mutuality and consideration.—*Merchant v. O'Rourke*, 351.
18. **Parties—*Officer and Stockholder with Corporation***—For one who is a stockholder in and secretary of a corporation, but not on its board of directors, to make an agreement with the board, is not to make agreement with himself.—*Hitt v. Sterling-Goold Mfg. Co.*, 460.
19. **Personal Liability—SIGNATURE**—The signature to an instrument, "E. S. O. Trustee," creates a personal liability of the signer of such instrument.—*Riegel v. Ormsby*, 10.
20. **Specific Performance**—Where a corporation owning land agreed to hold the same in trust, to sell, collect, and to pay over to the defendant a certain portion of the proceeds, less the amount of a mortgage due thereon, on his agreement to pay \$1,000 in installments, etc., and on the non-payment of the mortgage, arising from the contract holder's failure to pay installments, the corporation assigns such contracts to the mortgagee, to apply the balance due thereon in payment of the mortgage, the fact that its payment would exhaust the lands and render the corporation insolvent, so that neither the mortgagee nor the corporation would be able to perform the contract, constitutes no bar to the mortgagee's recovery on the contract; such inability having arisen through no fault of the mortgagee or the corporation.—*Dorr v. Alford*, 278.

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TO

CORPORATIONS

CONVERSION—See LAND. AND TEN., ¹ to ⁵; MORTG., ¹.

CORPORATE CAPACITY—See PLEAD., ⁵.

CORPORATIONS—See ATTACH. LEVY, ⁴; BOARD OF HEALTH, ²;
CONTRACTS, ¹⁸.

1. **Assignee of Note By** —Where a payee takes a note from a corporation, with knowledge that its stock was exchanged for property at an excessive valuation, his assignee, after maturity, who has secured judgment on the note against the corporation, cannot recover on such judgment against an owner of the stock, because he has not paid the full value of his stock, since such assignee has no greater rights against such owner than his assignor had.—State Trust Co. v. Turner, 664.
2. **Stockholders—PAYMENT FOR STOCK**—Where property is received by a corporation at a speculative and excessive valuation in payment for shares of its stock, it is only a payment to the extent of the property received, and the owner of such stock is liable to the creditors for the difference between the true value of the property and the face value of the stock.—*Idem*.
3. **RECORD OF TRANSFER—Sufficiency**—Under Code 1873, section 1078, requiring transfers of corporate stock to be made on the books of the corporation, a memorandum, made with a pencil on the stub of the stock book, showing the parties, the stock transferred, and the nature of the transfer, is a sufficient record thereof.—Perkins v. Lyons, 192.
4. **REASONABLE EFFORT TO OBTAIN**—An assignee of corporate stock cannot, because he insisted that the transfer be made, insist that he exhausted all reasonable means to have the stock transferred on the books of the corporation, as required, by Code 1873, when he was in the corporation's office, where the books were kept, and he could have seen the transfer made, the secretary of the corporation being willing to make it.—*Idem*.
5. **BOOKS KEPT OUT OF STATE**—Under Code 1873, section 1078, requiring the books of a corporation to show all transfers of stock, and be kept subject to inspection, the transfer of stock in an Iowa corporation is not valid, as against creditors, when made on the books of the corporation, kept in Boston, Mass., as the books are to be kept for inspection in the state.—*Idem*.

CORPORATIONS Continued

TO

CRIM. LAW

6. *Retroactive Statutes*—Code 1873, section 1078, providing that a valid transfer of corporate stock must be made on the corporation's books, as amended by Acts Twenty-sixth General Assembly, chapter 81, providing that such a transfer as collateral security is valid after notice to the secretary of the corporation, did not give any validity, as against creditors, to an unrecorded transfer of stock, as collateral security, made before the latter act was passed, as the act is not retroactive.—*Idem*.
7. *Succession—Jury Question*—Where intervener, claiming money attached as the funds of defendant association, contended that it was a new and different association from defendant, and the evidence merely showed that the intervener association was composed partly of new officers and members under another name, but organized for the same purpose as defendant, the jury were warranted in finding that such changes did not constitute the organization of a new and different association.—*Crawford v. Asso.*, 736.

CORRECTION OF RECORD—See APPEAL, ²⁹.

CORROBORATION—See CRIM. LAW, ³⁰, ³⁶, ³⁸, ³⁹; EVID., ⁷.

COSTS—See ATTORNEY FEES, ³.

COUNTY PAPERS.

1. *Selection—Appeal to District Court*—Where an appeal from the overruling of a motion to dismiss appeal to district court was not taken within the six months allowed by law, it cannot be considered.—*Young v. Rann*, 253.
2. *"Bona Fide Yearly Subscribers" Defined*—Under Code, section 441, providing that the Board of Supervisors shall award the county printing to the two newspapers published in the county which have the largest number of *bona fide* yearly subscribers, within the county, it is not necessary that a subscriber should have had the paper for a year in order to be counted, if his subscription was *bona fide* and for a year.—*Idem*.

COURT AND JURY—See CONTRACTS, ⁷, ⁸, ⁹; CORP., ⁷; CRIM. LAW, ¹⁶, ²³, ²⁹, ³⁴, ⁴⁰; ESTATES DEC., ³; INSTRUCT., ⁶; INSUR., ⁸; LIBEL, ³; MASTER AND SERVANT; NEGOT. INSTRUMENT, ¹⁰; NEGLIGENCE, ⁴, ⁶; PRACT., ³, ⁴, ⁶; RAIL., ¹¹, ¹³, ¹⁴; WARRANTY, ⁶.

CREDITORS—See TRUSTS, ².

CRIMINAL LAW.

Agency—See ⁹, *post*.

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1. **Appeal—TRANSCRIPT AT EXPENSE OF COUNTY—*Duty of Relatives***—Where defendant in a criminal case has no means, and his relative refuse to furnish him money to pay for a transcript necessary for appeal, it is error for the trial court to deny his application for transcript at the expense of the county, as authorized by Code, section 254, since there is no law requiring relatives to assist in such a case, where defendant is an adult.—State v. Wright, 621.
2. **Arson—ATTEMPTS TO BURN—*Instructions***—Where defendant was charged with burning a building, an instruction that if the jury find that the building was in some appreciable degree burned or consumed, or that the fire was communicated to the woodwork or other inflammable materials of which it was constructed, so that the same were in some measure destroyed if such flames had not been extinguished, it would be sufficient to support the crime charged, was not prejudicial to defendant as destroying the distinction between the offense charged and the setting fire to a building with an intent to burn it.—State v. Spiegel, 701.
3. **EVIDENCE OF ARSON**—Evidence which tended to show that flames charred and injured some of the window frames, casings and doors of a building, so that they had to be repaired, and in some instances wholly replaced, was sufficient to support an indictment for arson.—*Idem*.
4. **Burglary—PRESUMPTION AS TO ATTEMPT TO STEAL**—The presumption is that a person who breaks and enters the house of another in the nighttime, did so with intent to steal therefrom, and evidence that one who is shown to have so entered a house was discovered in a room occupied by a female, with his hand on her person, and that, on her making an outcry, he escaped without taking anything, is not so inconsistent with a verdict finding that he entered with an attempt to steal as to authorize setting it aside.—State v. Worthen, 267.
5. **EVIDENCE—*Conclusion***—In a prosecution for unlawfully breaking into a house with intent to steal, a question to the owner of the house as to whether he had any valuable property that he knew the defendant knew of, calls for a conclusion and is incompetent.—*Idem*.
6. ***Of Intent***—In a prosecution for breaking and entering a house with intent to steal, where the defense denies the attempt to steal, and introduces evidence tending to show

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that defendant entered for the purpose of having unlawful sexual intercourse with a female, in whose room he was discovered, evidence that the owner of the house had valuable property therein, and that defendant knew about it, is admissible as bearing on the question of intent.—*Idem.*

7. INSTRUCTIONS—In a prosecution for breaking and entering a house in the nighttime with intent to steal, an instruction that the jury should consider that the owner was possessed of but very little valuable property, if they find that such was the fact, and the defendant's knowledge thereof, if he had such knowledge, as bearing on the question of the intent with which he broke and entered the house, was properly refused, when there was no evidence that defendant had any knowledge of what property the owner had.—*Idem.*
8. JURY QUESTION—Defendant broke and entered a house in the nighttime, and was discovered in a room in which a female was sleeping. He awoke the girl by placing his hand on her person, and when she attempted to make an outcry he placed his hands over her mouth. Another girl was sleeping with the girl on whose person he placed his hands, and her parents were sleeping in the adjoining room. He had thrown the doors of the house open and lighted a lamp. On the girls making an outcry he escaped without taking anything with him. *Held*, not to raise a presumption that defendant broke and entered the house with intent to commit an assault on the girl, but whether he entered for that purpose or to steal, was a matter for the determination of the jury.—*Idem.*

Corroboration—See ³⁶ to ⁴¹, *post*.

Court and Jury — See ³³, ³⁴, *post*.

9. Embezzlement—AGENT TO SELL LANDS—*Termination of Agency*—Defendant, a real estate dealer, secured a power of attorney to sell a customer's land for him and a deed to same, with the grantee left blank. He filled in the name of an employe, who executed a mortgage to the customer, and also deeded him certain Nebraska lands, recording the deed, but never actually delivering it to the customer, and later conveyed the equity to the defendant, who sold it. The customer afterwards made several offers to sell the Nebraska land, and refused to mortgage it, saying he wished

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to keep it clear. *Held*, that the transaction was voidable, and not void, and that the customer had by his actions ratified the same, that thus, the relation of principal and agent had been terminated, that by his ratification, the agent became owner of the land and, hence, defendant was not guilty of embezzlement in refusing to account for the proceeds of the sale of the equity in the customer's lands.—*State v. Engle*, 246.

Evidence — See ⁸ to ⁷, *ante*; ¹¹, ²⁰, ²³ to ³², *post*.

10. **CROSS-EXAMINATION—*Timely Objection***—Where, on cross-examination, it was developed that the answers of the witnesses on direct examination were based on hearsay, for which reason they were struck out on motion of defendant, defendant not having objected to the introduction of such testimony as hearsay during the direct examination, or requested that he be allowed to inquire into the nature of defendant's knowledge before such testimony was given, no error can be based on the failure of the trial court to exclude such testimony in the first instance.—*State v. Spiegel*, 701.
11. **IMPEACHMENT—*Minutes Before Magistrate***—Minutes of the testimony taken at a preliminary examination of one charged with a burglary, are inadmissible for the purpose of impeachment, where the witness testified to the same facts on trial that she did on preliminary examination.—*State v. Worthen*, 267.
12. **Extradition—INFORMATION AND INDICTMENT—*Variance***—Where defendant was extradited from Canada for setting fire to and burning a certain brick "house," occupied and inhabited as a retail shoe store, and was indicted for setting fire to and burning a certain store "building" then and there occupied as a store, the objection that the crimes charged in the information and in the indictment were not the same was without merit.—*State v. Spiegel*, 701.

Good Character—See ²⁶, *post*.

13. **Indictment**—See ¹², *ante*; ¹⁹, ²³, *post*—***Construction***—Code, section 4780, provides that if any person wilfully and maliciously burn, either in the day or nighttime, the building of another, he shall be imprisoned, and section 4781 declares that, if any person set fire to any building with intent to cause such building to be burned, he shall be imprisoned. *Held*, an indictment which charged defendant with wilfully, feloniously,

CRIM. LAW Continued

and maliciously setting fire and burning a certain store building then and there occupied as store, clearly charged the offense specified in section 4780, and was not open to the objection that it was impossible to determine under which of said two sections the crime was charged.—*Idem*.

14. **SETTING ASIDE—Grounds**—The grounds specified in Code, sections 5319-5321, on which a motion may be based to set aside an indictment are exclusive of others not named, and such motion cannot be founded on the fact that a member of the grand jury, finding the indictment, had previously formed and expressed an unqualified opinion of the defendant's guilt; that not being one of the grounds enumerated.—*State v. Baughman*, 71.
15. **RESUBMISSION—Final Adjudication**—It is held *arguendo* that under Code, section 5331, providing that where demurrers to indictment are sustained on other grounds than those which are a legal defense or a bar to the indictment, the court may order the cause resubmitted to a grand jury, and any bail given to remain in force, a judgment, entered on a defective indictment after the taking of testimony begun, that the cause be resubmitted to a grand jury, that the petit jury be discharged, and that defendant recover his costs, not being a final judgment, does not discharge defendant or exonerate his bail.—*State of Iowa v. Evans*, 80.
16. **Insanity—Jury Question**—Where, on a prosecution for murder, the defense was insanity, the question of accused's insanity was for the jury.—*State v. Geier*, 706.

Instructions — See ², ⁵, *ante*; ²⁰, ⁴¹, *post*.

Intoxicating Liquors — See ¹⁸, ²¹, *post*.

17. **Jurors—QUALIFICATION**—That a juror, on a prosecution for murder, where the defense was insanity, had heard the details of the crime, and had the scene of the same pointed out to him, would not disqualify him, where it did not appear that he had heard anything as to the sanity or insanity of the accused, or expressed any opinion as to his guilt or innocence.—*Idem*.

Jury Question—See ⁸, ¹⁶, *ante*; ³³, ³⁴, ⁴⁰, *post*.

Keeping House of Ill Fame—See ²⁵, ⁴⁶, *post*.

18. **Liquor Nuisance — DEFENSES—Oversight and Mistake no Defense**—The requirements of law providing for the sale of

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- liquor for certain purposes and in a certain manner, and naming the things that the seller must do before making such sale, may not be avoided by him by proving oversight, forgetfulness, or mistake.—State v. Swallum, 37.
19. **INDICTMENT**—An indictment for keeping a nuisance alleged that defendant used a certain building as a drug store, “with the intent to sell there intoxicating liquors, to-wit (describing them), and then and there did sell the same.” *Held*, that the words “then and there,” following the description of the liquors, are sufficient to designate the drug store as the place of the unlawful sale.—State v. Pinckney, 34.
20. **INSTRUCTIONS—Evidence**—A witness said he “had bought prescriptions for others, but did not know how they read or whether they called for intoxicating liquors or not.” There was no evidence that the prescriptions sold this witness contained intoxicating liquor. *Held*, it was error to submit the question whether defendant sold intoxicating liquors upon a physician’s prescription without taking a written request therefor.—State v. Swallum, 37.
21. **REQUEST FOR LIQUOR—DESCRIPTION OF RESIDENCE**—Under Code section 2394, providing that, before selling intoxicating liquors to any person, a request must be signed by the applicant stating for whom and for whose use the liquor is required, his residence, and, where numbered, by street and number, if in a city, etc., an applicant for the purchase of liquors for his own use must state in his request his residence, by street and number, if he lives in a city where the residences are numbered.—*Idem*.
22. **SPECIFICATION OF USE INTENDED**—Code, section 2385, provides for the sale of alcohol for “specified” chemical and mechanical purposes. Section 2394 provides that the request of the applicant for the purchase of intoxicating liquors must state, “the actual purpose for which the request is made and for what use desired.” *Held*, that the purchaser of alcohol must specify in his request the exact purpose and use for which it is required.—*Idem*.
23. **Evidence—REVIEW OF VERDICT**—Defendant, the father of an illegitimate, accompanied its mother to a place where they were strangers and where she gave birth to the child. On returning home with the child, about two weeks thereafter, early in March, they wrapped it in a shawl, and on the way

CRIM. LAW Continued

they went from one depot to another at a certain place to make a transfer. Defendant procured a buggy and drove by an unfrequented road to the other depot, where the mother alighted, leaving the child with defendant; and it was not seen alive thereafter. He then drove towards the fair grounds, and a witness saw the same team there about the same time. The infant's dead body was found in a good state of preservation two weeks after, near the fair grounds and identified. It lay on the ground, and had wounds on its person sufficient to have caused death. Defendant had time to drive to where it was found, and return and take the train with its mother, which he did. When he returned the team he took from his buggy a shawl, and, a short time after, an infant's robe was found in the manger in front of the horses. Up to leaving the depot with the child, defendant denied none of the facts established, but claimed to have driven back into town and delivered it to a woman from a distant city, under a pre-arrangement with her. But this woman was not seen by any one. Though the testimony was conflicting, there was expert evidence that the body could, without decomposing, have lain where it did from when defendant was last seen with it until it was found. There was other evidence to show that it must have been alive later than the day in question, but it was inconclusive and doubtful. There was also evidence of an admission of guilt by defendant. *Held*, to amply support a conviction.—*Idem*.

24. **Murder of Bastard**—INDICTMENT—FAILURE OF PROOF AND VARIANCE—An indictment charged the murder of one James Cunningham Hepp, omitting all other description of deceased. Defendant was convicted of the murder of an illegitimate born to James Cunningham and Ida Hepp. A motion to direct a verdict was overruled, one of the grounds being that there was no evidence that James Cunningham Hepp ever existed. *Held*:

- a. While it is true that a bastard bears the name of neither parent and the grand jury had no authority to give it a name combining that of its parents, yet the case is governed by Code, 5286, which provides that where certain offenses are "described in all other respects with sufficient certainty to identify the act, an erroneous allegation of the name of the person injured is not material."
- b. Were the question open, some of the members of the court would construe this section to be inapplicable to

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- cases where, like here, no description beyond the name given in the indictment is attempted of deceased.
- c. But the rule established is, that if an offense is charged in the indictment and from facts in evidence, the court is satisfied defendant was not misled, this warrants the conclusion that the act intended to be charged was sufficiently described or indicated.
 - d. Where the one injured is described by name alone, extrinsic facts may be considered in order to determine whether the act charged was so specifically pointed out as not to mislead the defendant.
 - e. Facts outside of the indictment may be considered in determining whether defendant understood the specific charge intended to be made.
 - f. Defendant was not misled by the misnomer.
 - g. Under the circumstances it was not error for the court to instruct that the intention of the indictment was to charge the killing of the infant child of Ida Hepp, instead of leaving it to the jury whether the nameless infant was the person whom defendant was charged with killing.—*State v. Cunningham*, 233.
25. SAME—Assuming it to be charged by the court that if the jury found murder was not done on the day charged in the indictment, there must be substantive evidence that the killing was done on a different day, every circumstance pointing to motive and intent may be considered with relation to any particular date on which an alleged crime may have been committed and evidence of circumstances showing motive, intent, and opportunity to commit infanticide, and of an admission of guilt, warrants a conviction, though the jury may determine that the killing was not done on the day charged.—*Idem*.
26. GOOD CHARACTER—In a prosecution for infanticide an instruction that, if the jury found defendant guilty, evidence as to his humane and kindly disposition towards children constitutes an ingredient to be considered in passing on the grade of his offense, without reference to the apparently conclusive or inconclusive character of the other evidence, and that the jury were to consider this evidence throughout their deliberations, and give it such weight as they thought

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is justly entitled to, was proper, and did not limit the jury in their consideration of such evidence.—*Idem*.

27. **HARMLESS ERROR**—Defendant claimed that he could not have committed a murder as early as charged because the body would in that event have shown greater decay when found. Under these circumstances, it did not harm defendant to let the State show that a doctor produced by it, and who testified on the progress of decomposition, had obtained his experience with bodies treated with a preserving compound.—*Idem*.
28. **Included Offenses—Killing of Infant**—In a prosecution for murder in the first degree, where no one witnessed the killing, the victim being an infant, the court properly submitted the included offenses of murder in the second degree and manslaughter, warranted under the facts which might have fairly been found; but no offense lower than manslaughter could have been committed.—*Idem*.
29. **Perjury—EVIDENCE—Corrupt Motive**—On a prosecution for perjury in falsely swearing in an affidavit for a cost bond that plaintiff in a suit was a corporation, evidence warranting a finding that accused had no reasonable cause for believing plaintiff to be a corporation, and that the affidavit was made to secure a dismissal of the case, is sufficient to show a corrupt motive in making the affidavit.—*State v. Clough*, 714.
30. **EVIDENCE TO SUPPORT CONVICTION—Corroboration**—Evidence by two witnesses that a certain firm was not acting as a corporation, with corroborating facts showing that it was not a corporation, is sufficient to support conviction for perjury in falsely swearing in an affidavit for a cost bond that such firm was acting as a corporation.—*Idem*.
31. **ADMINISTRATION OF OATH—Evidence**—On prosecution for perjury in falsely swearing to an affidavit, the certificate of a clerk of courts, attached to such affidavit, and proof of his handwriting is sufficient *prima facie* evidence of the jurat, and that he performed his duty as clerk.—*Idem*.
32. **OATH—Jurisdiction to Administer**—A suit was begun in Polk county against defendant, who was a resident of Warren county, and others. The action appears to be *in rem*. It does not appear whether a personal judgment was sought. While this suit was pending in Polk county, one involving the same matter, and seeking personal judgment was brought

CRIM. LAW Continued

in Warren county. Defendant appeared in that court and applied for a cost bond. Before any objection was raised to the jurisdiction of the Warren county court, defendant made an affidavit, in support of his said application, upon which affidavit perjury is charged. *Held*, conceding that the actions were such that a plea in abatement would lie, yet the Warren county court had acquired jurisdiction to entertain said affidavit, which jurisdiction it would retain until some reason was shown why it should no longer retain jurisdiction—*State v. Clough*, 714.

33. COURT AND JURY—*Jurisdiction*—On a prosecution for perjury in falsely making an affidavit for cost bond in a civil action, the court may properly instruct that such civil court had jurisdiction to determine the application for cost bond, as jurisdiction is a question of law.—*Idem*.
34. *Same*—And that the matter charged to be falsely sworn to is material, and that a clerk of the courts had right and authority to administer the oath.—*Idem*.
35. Prostitution—The keeping of a covered wagon, drawn from place to place and used as a place of abode for human beings for the purpose of prostitution, is within the statute prohibiting the keeping of a house of ill-fame.—*State v. Chauvet*, 687.
36. CORROBORATION OF ACCOMPLICE—Evidence of an accomplice of a defendant charged with keeping a house of ill-fame, which consisted in the use of a covered wagon, in which prostitution was carried on, is sufficiently corroborated by defendant's apparent control of the wagon and team, supported by his admissions.—*Idem*.
37. Reasonable Doubt—Where one of the defenses was an alibi, and the court charged that if the defendant had failed to establish the defense of alibi by a preponderance of the testimony he was not entitled to an acquittal on that ground or to have it considered as a basis of a reasonable doubt. *Held*, the instruction was erroneous because if the testimony to sustain the alibi fell short of a preponderance, it was still to be considered by the jury, together with all the other evidence, and a reasonable doubt upon all the evidence, including that which failed to sustain the alibi by a preponderance, entitled defendant to acquittal. The word "it" was misleading. The jury may well have applied it to the

CRIM. LAW Continued

TO

DAMAGES

testimony in support of the alibi, rather than to the *defense* called alibi.—State v. McGarry, 709.

38. **Seduction—Corroboration**—Where defendant had not known the prosecutrix prior to the night of the alleged seduction, and never met her but twice afterwards, evidence that he accompanied her to her home from a dance on that night, a distance of six or seven miles, and stated to others before leaving that he “would take the girl home and get his work in then,” was not sufficient corroboration to support an indictment for seduction.—State v. Kissock, 690.
39. **SAME**—In a prosecution for seduction, the birth of a child to the prosecutrix, as a result of the alleged illicit intercourse, is not corroborative evidence of the alleged seduction.—*Idem*.
40. **Sufficiency—Jury Question**—The sufficiency of the corroborative evidence offered in a prosecution for seduction is a question for the jury.—*Idem*.
41. **INSTRUCTIONS—Applicability to Evidence**—Where defendant had not known the prosecutrix prior to the night of the alleged seduction, and there was no evidence that he was frequently with her, or had made any admissions as to the alleged paternity of her child, an instruction that the corroboration required by law may be shown in a variety of ways, such as that the defendant was keeping company with the prosecutrix or was frequently with her, or that a child was born, or by admissions of defendant tending to establish the alleged intimacy or paternity of the child, was erroneous, as not supported by the evidence.—*Idem*.

Transcripts—See ¹, *ante*.

42. **Trial—EXCLUSION OF WITNESS—Violating Order of Exclusion**—Where, under order of court, witnesses were excluded from the court room, the fact that, after examination, a witness remained in the room did not justify denial of permission to recall him.—State v. Kissock, 690.

Witnesses—See ⁴³.

CUSTOM—See EVID., ⁴⁶.

DAMAGES—See DRAINAGE; FORECLOSURE, ¹; FRAUD. SALES, ¹⁰; LIBEL, ², ³; MUN. CORP., ¹⁰, ¹¹, ¹⁶; RAIL., ¹ to ⁸.

1. **Breach of Contract—Instructions**—Where the owner of water-works used them for two years after their construction

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for him by a contractor, without any effort to remedy the defects therein, which were such as could have been readily remedied at moderate expense by moderate efforts, the court should, in an action for damages for such defects, have instructed as to what is meant by reasonable time; and that two years was more than a reasonable time in which to remedy the defects; and, though the instruction given correctly stated the law so far as it went, and no further instruction was asked, it was prejudicial, the jury being at liberty under it to allow damages for the entire two years.—*Hensen v. Beebe*, 534.

2. *Same*—Though there are defects in waterworks which a contractor has constructed, yet, they being such as not to render the works valueless, but such as might be readily remedied at a moderate expense by moderate efforts, he is not liable for damages occurring therefrom after the owner had reasonable time in which to remedy them.—*Idem*.
3. AGREEMENT TO MAINTAIN BRIDGE—An agreement by a railway company with the owner of land on purchasing a right of way recited that such railway company would build a bridge on the line of its road, and furnish an undergrade crossing for plaintiff, to a spring on said land. Such passageway was built, and used by plaintiff and his predecessors for 26 years, when the bridge was replaced by another, leaving a narrower passage. *Held*, in an action for damages, that a refusal to instruct that if the passageway was narrow, so that it did not conform with the passageway theretofore used, plaintiff might recover, was not erroneous, since the agreement did not call for a passage of any particular width, and the new passage was ample for teams and stock.—*Olver v. B., C. R. & N. Ry. Co.*, 221.
4. Future Damages—In an action for injuries from the bite of a dog, where the evidence as to plaintiff's future pain and suffering is conflicting, it is error to instruct that if the jury find her entitled to recover, her damages are such as arise from pain and inconvenience and the impairment of enjoyment for such time as the same have or may continue, as shown by the evidence, though the jury are also instructed that they cannot allow for pain and suffering not caused by the bite, since the erroneous instructions permit the jury to enter the domain of conjecture as to future damages.—*Sanders v. O'Callaghan*, 574.

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5. **Liquidated Damages and Penalty—*Burden of Proof***—Where a building contract, providing that in case of delay the contractor shall pay to the owner ten dollars per day for every day after that named for the completion of the work “as liquidated damages,” contained no provision from which it could be determined whether the parties intended such sum to be liquidated damages or a penalty, the usual technical meaning of such term will be applied to it, in the absence of a contrary showing; the burden being on the contractor, in an action to recover the amount retained by the owner under such clause, to show that the same was a penalty.—*Kelly & Mahon v. Fejevary*, 693.
6. **Measure of Damages**—In an action for injuries to abutting property resulting from cutting down a street on which no grade had been established, and where no part of plaintiff's property is taken, the measure of damages is the difference between what the property was fairly worth on the market before the work was done, and what it was so worth thereafter.—*Richardson v. Webster City*, 427.
7. **EVIDENCE OF VALUE—*Conclusions***—In an action against a city for damages to abutting property from cutting down a street, it is not competent to ask a witness as to what, in his opinion, is the difference in the value of the plaintiff's property at the time of trial and immediately before the cutting was done, or as to how much less is the value of the premises in question since the cut was made than it was before, as such questions call for the conclusion of the witness.—*Idem*.
8. **Competency**—The question as to whether plaintiff's property is any better than lots owned by a witness on another corner of the same street, or as to what lots had been sold for in the part of town where plaintiff's property is situated, is not competent for the purpose of showing what other property in the vicinity of that of the plaintiff has sold for; assuming that to have been the purpose.—*Idem*.

DECEDENTS—See EVID., 29 to 33.

DECLARATIONS—See ASSIGN., 3.

DEDICATION.

1. **To City—EVIDENCE**—Dedication of a strip in extension of a street, and acceptance thereof by the city, are shown by the owner selling lots on either side, representing the same as

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DEEDS

corner lots, and acquiescing in the use of the same as a public street for fourteen years thereafter, and by the construction of fences on either side, with gates opening into the street, the building of sidewalks and planting of trees along it, and the improvement of it by the city by digging side ditches along it and keeping them open, working the middle of the road and clearing away the snow in the winter.—Hull v. City of Cedar Rapids, 466.

2. **TAXATION BY CITY—*Estoppel***—Taxation by a city of taxes on property after its dedication as a street does not estop it from claiming that it had become a public street.—*Idem*.
3. **PLATS**—Where a recorded plat shows a street running along the river, with lots lying between the street and the river, except for a short distance, where it shows a strip too narrow for lots, with only a dotted line between it and the street as elsewhere extended, such a strip is part of the street by dedication.—Boehler v. City of Des Moines, 417.

DEEDS—See EVID., 42; QUIET. TITLE.

1. **Evidence—INSANITY OF GRANTOR**—In an action to set aside a conveyance from a husband to his wife, it appeared that the husband was eighty-four years old and that the wife was well along in years; that the husband and one A. had had certain litigation over real estate, resulting in A.'s favor; that thereupon the wife, without other foundation for the belief, conceived the idea that A. was meditating an attack on her husband's entire property on his death, and that A. had forged deeds to her husband's lands, and was ready, on his death, to assert title thereto, that she had repeatedly pressed this idea on her husband, who was in feeble health, and prayed for strength and guidance to thwart A., and had insisted that, in order to do so, the land must be conveyed to her; that this was at last done, by the conveyance in suit, after consultation with the family lawyer; and that both husband and wife were afterwards adjudged insane, the husband dying in an asylum. *Held*, that the evidence showed the husband to have been insane at the time when the conveyance was executed.—Sedgwick v. Jack, 745.
2. **Delivery—PRESUMPTION AS TO DATE**—Delivery of a deed is presumed on the day of its date or acknowledgment.—Hall v. Cardell, 206.
3. **TO PARENT FOR INFANT**—Parents, being by Code, section 3192, made the natural guardians of their children, may, as such

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DEEDS Continued

guardians, accept the delivery of deeds made to them.—*Idem.*

4. OF ACCEPTANCE BY INFANTS—Where a deed is made to an infant but a few weeks old, although it is not immediately beneficial, acceptance thereof is presumed and conclusively implied.—*Idem.*
5. SUFFICIENCY—A deed by a father and mother to their infant daughter was on the date of its execution placed by the former in the child's lap, the mother taking the instrument to hold for the benefit of the daughter. The father testified that it was the intention of the parties that delivery to the mother should constitute delivery to the child. *Held*, a sufficient delivery.—*Idem.*
6. REBUTTAL OF PRESUMPTIONS FROM POSSESSION—Where a non-resident defendant's real estate was attached at suit of a creditor, and defendant's father-in-law intervened, claiming title through a deed from defendant dated prior to the attachment, but not recorded till afterwards, and the evidence showed that defendant executed a lease of the premises in his own name after the date of the deed, and received rent for one quarter after the levy of the attachment, and that, thereafter, intervener's son, who was also defendant's employe, received the rent, such evidence was sufficient to rebut the presumption of delivery arising from the intervener's possession of the deed, and hence an order dismissing plaintiff's petition and discharging his levy was erroneous.—*Parlin, O. & M. Co. v. Daniels*, 640.
7. Presumption of Marriage—*Grantees in Deed*—A deed was executed by T. H., and signed, also, by E. H., who acknowledged it as his wife. There was some evidence that at the time of the execution of the deed he was living with her as his wife, though in fact married to another, but there is no evidence that he ever lived with the latter. The grantees and their purchasers had held and occupied the premises under the deed for over thirty years, in the belief that the woman who signed the deed was the wife of the grantor. *Held*, that without clear evidence of a former marriage, it would be presumed that the one with whom he lived was his wife.—*Hager v. Brandt*, 746.
8. Revenue Stamp—It is presumed that a deed properly recorded bore a revenue stamp, although such stamp is not shown by the record thereof.—*Hall v. Cardell*, 206.

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DRAINAGE

9. **VALIDITY**—The want of a revenue stamp does not render invalid a deed executed on April 6, 1872.—*Idem*.

DEED AS MORTGAGE—See STAT. LIM., ⁶.

DELIVERY—See DEEDS, ² to ⁷.

1. **Constructive Delivery of Machine — Passing of Title**—Plaintiffs sold defendants certain machinery, and defendants gave old machinery and their notes in payment. The notes were delivered to plaintiff's agent, who told defendants to leave the old machinery on his farm till further order, which was done. *Held*, that the title of the old machinery passed to plaintiffs, though they did not have actual custody of it, neither the statute of frauds or the rights of third persons being involved.—Robinson & Co. v. Berkey & Martin, 550.
2. **Delivery of Notes — SUFFICIENCY—Evidence**—A banker wrote out a note to his daughter, in her presence, which was found in an envelope at his death, deposited in the separate pocket of a note case in his safe at the bank. Envelope also contained certificates of deposit written by him at the time, and other notes indorsed by him in blank. Decedent had written his daughter's name on the envelope, with a statement that the notes were held as collateral security, and had signed his name. *Held*, that such facts showed that decedent had kept the notes as his daughter's banker, for safe-keeping, and for the purpose of collecting and crediting the proceeds of the other notes found therewith, which act constituted a sufficient delivery of the notes.—In re Reeve's Estate, 260.
3. **REDELIVERY FOR SAFE KEEPING**—Where notes given by decedent to his daughter as collateral to a note executed by him to her for a *bona fide* indebtedness were delivered to the daughter, the fact that she returned them to decedent, who was a banker, for safe keeping and collection, did not deprive her of her rights in the notes so pledged as collateral.—*Idem*.

DIRECTED VERDICT—See INSUR, ⁴. PRACT., ⁶; SETTLEMENT.

DISTRIBUTIVE SHARE—See ESTATES OF DECED., ⁵.

DIVORCE—See ALIMONY; HOMESTEADS.

DRAINAGE.

Diversion of Flow — Injunctions—Where a culvert for the drainage of water did not increase the quantity of water on plaintiff's land, or throw it thereon in a different manner

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ESTATES OF DECEDENTS

than the same would naturally have flowed on it, a petition to enjoin should be dismissed.—Schrope v. Trustees Pioneer Twp., 113.

ELECTION—See GUARD. AND WARD, ³, ⁴, ⁵; WILKS, ⁴.

EMBEZZLEMENT—See CRIM. LAW, ⁹.

EQUITY JURISDICTION.

1. **Cloud on Title**—A court of equity, in the absence of statute, has inherent power to remove a cloud from the title of real estate at the suit of one in possession.—Blair v. Hemphill, 226.
2. **Laches**—Where a plaintiff allows over twenty years to elapse before beginning a suit to recover lands conveyed by deeds operating as mortgages under contracts of defeasance, his claim is stale, and his laches such as to preclude him from equitable relief.—Adams v. Holden, 54.
3. **Injunction — APPEAL FROM ASSESSMENT—Not Only Remedy**—Equity will enjoin the collection of a void local assessment, and taxpayers are not relegated to an appeal from the assessment.—C., M. & St. P. Ry. Co. v. Phillips, 377.
4. **Quieting Title — AGAINST LIENHOLDER**—Under Code, section 4223, providing that the action of quieting title of real property may be brought against any person "claiming title thereto," an action to quiet title can be maintained against a mere lien-holder.—Blair v. Hemphill, 226.

ESTATES OF DECEDENTS.

1. **Claims—EVIDENCE**—Where one of decedent's former employes testified that decedent had requested her in 1895 to figure the interest on his note to his daughter, and there was then nearly \$2,000 due thereon, and that decedent spoke of having the note renewed, saying that he had borrowed the money, and another employe testified that during the fall of the following year decedent and the daughter figured the interest on the note, and her testimony showed that the note in question, dated October 19, 1896, for \$2,310 and found in decedent's safe, was then executed by him, such evidence showed a *bona fide* indebtedness, constituting a valid claim against decedent's estate.—In re Reeves Estate, 260.
2. **SAME—Evidence**—Plaintiff in 1897 alleged that deceased orally promised in 1856, after having known her and her parents but one day, to give her a child's share in his estate. Plain-

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ESTATES OF DECEDENTS Continued TO ESTOPPEL

tiff's mother testified that deceased stated to her that, if plaintiff stayed with him until grown she could share in his estate with his children, and that he would do as good a part for her as one of his own children. There was evidence that the taking of plaintiff by deceased was a relief to her mother, and plaintiff's sister testified to the same promise. Plaintiff lived with decedent until 1865, and, though residing in an adjoining county, saw him but once thereafter, and testified to no further conversation relating to the promise. Letters written by decedent were produced and portions claimed to be material, being missing, were supplied by plaintiff's testimony, though witnesses testified they saw such written portions several years before, and two witnesses, friends of plaintiff, who had given a chattel mortgage to decedent which had been foreclosed, testified to statements tending to support plaintiff's claim. *Held*, that such evidence was insufficient to support the agreement.—*Holmes v. Connable*, 298.

3. NOT ESTABLISHED AS A MATTER OF LAW—Where a claim against an estate devised to others is based on an alleged oral contract with decedent, and no witness who could deny the contract is living, such claim cannot be considered as established as a matter of law, because witnesses have testified to the making of the contract, and none have been called to deny it, because the defense may arise from the improbability of the testimony given.—*Idem*.
4. Notice by Executor—NOT PRESUMED—It not being proven that notice was given by the executor, a claim against the estate will not be barred by limitations, which begin to run from the giving of the notice.—*Easton v. Sommerville*, 164.
5. Unadmeasured Distributive Share — EXECUTIONS—The unadmeasured distributive share of the husband in his deceased wife's real estate is not subject to levy under an execution against him.—*Brightman v. Morgan*, 481.

ESTOPPEL—See APPEAL, ³⁰; INSUR., ¹⁴, ¹⁶; DEDICATION, ²; LAND AND TEN., ²; MORTGAGES, ¹; MUN. CORP., ⁸; PLEAD., ⁸; REFORMATION; WARRANTY, ².

Representations—*Estoppel to Deny*—Where an advantage has been acquired because of representations made by one, he cannot be heard to say that those representations were not true.—*Riegel v. Ormsby*, 10.

EVIDENCE

EVIDENCE—See ASSIGN., ³; ANIMALS, ⁵; BOUNDARIES, ²; BREACH OF PROMISE; CRIM. LAW, ³, ⁵, ⁶, ⁷, ⁸, ⁹, ¹⁰, ¹¹, ²⁰; DAMAGES, ¹, ⁸; FRAUD, ²; FRAUD. SALES, ² to ⁸; INSUR., ², ³; LIBEL, ⁴ to ⁷; LANDLORD AND TEN., ², ⁴; MUN. CORP., ¹⁴, ¹⁵; NEGOT. INSTRUMENT, ⁸; RAIL., ⁴ to ⁹; WILLS, ², ⁶.

1. **Admissibility of Testimony**—In an action by a widow to recover of her deceased husband's unmarried brother for board and washing furnished such brother while he lived in her husband's family, the defendant should have been permitted to introduce evidence that he furnished half the family provisions and fuel under an agreement with her husband, as such evidence would go to the value of the board.—*McClintic v McClintic*, 615.
2. **AGE OF CHILD**—Where there is a question as to whether a child was born in April or June, testimony that the weather was warm and pleasant at the time witness saw such new-born child is admissible to show that she saw the child in June, rather than in April.—*Stewart v. Anderson*, 329.
3. **BOOKS AND PAPERS**—Where plaintiff sued to recover a drug business, which he claimed he had intrusted to his brother under an agreement that the brother was to receive a share of the profits for conducting the business, which the brother's executrix claimed had been purchased from plaintiff, the books and papers used therein were admissible to show the manner of conducting the business.—*In re Myers Estate*, 584.
4. **EXTRACTS FROM BANK BOOKS**—In an action against the assignees of a bank to impress a trust on funds in their possession, one of the assignees who was bookkeeper of the bank may, in testimony, give statements made up from the books of the bank showing the assets and liabilities and the disposition thereof, when the books from which the statements were taken were present in court, and were not offered in evidence, there being ample opportunity to examine them and to cross-examine the witness.—*Bradley v. Chesebrough*, 127.
5. **FRAUD**—Where defendant claimed that a note given for the right to sell a patent rupture cure was fraudulently obtained, a blank form of contract used by plaintiff in granting territory to sell such cure was admissible in evidence to show the manner in which the business was transacted.—*Wray v. Warner*, 64.

EVIDENCE Continued

Affidavits — See ²⁶, *post*.

6. **Age**—See ², *ante*; ¹³, ²⁹, *post*—The positive testimony of a father as to the age of his daughter sufficiently proves the same.—*Hall v. Cardell*, 206.

Ambiguity — See ²⁸, *post*.

Books and Papers — See ³⁴, ³⁹, *post*.

Breach of Promise — See ¹⁹, *post*.

7. **Corroborative or Collateral Matter** —Corroborative evidence of a purely collateral matter, not in dispute, is properly excluded.—*Stewart v. Anderson*, 329.
8. **Cross Examination** —**LATITUDE**—Under a defense of breach of warranty as to pedigree of cattle sold which were registered in a certain herd book, a wide latitude is proper in the cross examination of defendant as to the authority of such herd book and similar matters, when defendants held official position in the cattle club which published the register, and one of counsel for defendant was its secretary, the particular cattle in issue having been registered while said counsel owned them.—*Shambaugh v. Current*, 121.
9. **SAME**—Where plaintiff claimed that he left a valuable stock of drugs with his brother on removing from the state, under an arrangement by which the brother was to share in the profits in return for his services, it was not error to allow defendant to ask plaintiff, on cross-examination, whether he had not run off to another state, leaving attached property, since such evidence tended to show plaintiff's financial condition at the time of removal.—*In re Myers Estate*, 584.
10. **SAME**—Where plaintiff in an action for conversion of wheat on which he held a mortgage had testified only as to the execution of the notes and mortgage, which he produced and offered in evidence, and as to the amount that should be credited thereon, there was no error in sustaining objection to questions asked him, on cross-examination, whether he sent anyone out to the farm while the mortgagor was threshing, or then made any attempt to collect the mortgage.—*Gardner v. Roach*, 413.
11. **SAME**—Where, in an action to recover a stock of goods which plaintiff claimed he had left in the possession of defendant's testator, plaintiff had testified that he had sold his horse, and that his buggy had been stolen, it was error to allow de-

EVIDENCE Continued

fendant to ask him if he was not the man that stole the buggy, and whether it had not been so charged at the time, since such question was irrelevant and prejudicial.—In re Myers' Estate, 584.

12. **SAME**—Where plaintiff sued to recover a drug business, an interest in which defendant claimed her testator had purchased at the time of plaintiff's removal from the state, it was error to allow defendant, on cross examination to ask plaintiff's witnesses, testifying that testator had no means at that time, if testator had not advanced money to their husbands; it appearing that the money had been advanced by him some years after the date of the alleged purchase.—In re Myers Estate, 584.

Custom—See ⁴⁶, *post*.

Decedents—See ²⁹ to ³³, *post*.

Deeds—See ⁴² *post*.

Ex Parte Statements—See ²⁷, *post*.

13. **Expert and Opinion Evidence**—**AGE OF INFANT**—Whether a baby seen by a witness on a particular occasion was a newborn baby, or one that had been born some time, is a proper subject of expert testimony, since it is very difficult, if not impossible, to so describe a child of tender age as to enable the jury to judge for themselves.—Stewart v. Anderson, 329.
14. **EFFECT OF FLAME**—Opinions of witnesses as to the effect of flames on a meadow and hedge are admissible when they have shown themselves qualified to express an opinion.—Bradley v. Ia. Cent. Ry. Co., 562.
15. **LEGAL RESPONSIBILITY**—In an action, by the assignee of a seller, for the price of cattle sold, where the defense is breach of warranty that they were thoroughbred, a question asked of defendant as to what the seller said in regard to his responsibility for the calves bred of one of the cows sold is inadmissible for being an opinion as to legal responsibility.—Shambaugh v. Current, 121.
16. **LOSS BY FIRE**—In an action for the destruction of plaintiff's dwelling house by fire emitted from defendant's engine, it was not error to admit testimony of an insurance agent as to the cost of a building similar to the one burned, where there was other evidence showing that his method of estimating such cost was approximately correct.—Enix v. Iowa Central Ry. Co., 748.

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17. **NON-EXPERTS—Competency**—A man who had been treated for rupture by a patent remedy was competent to answer the question whether he was cured or not, though he possessed no knowledge of medicine, since the question did not call for a conclusion requiring special skill on the part of the witness, but for the statement of a fact.—*Wray v. Warner*, 64.
 18. **Failure of Consideration —Jury Question**—Where several witnesses who had been treated for rupture by a patent cure testified that they had not been cured, and the originator of the cure swore that 12,000 persons had been cured in the United States, but did not produce any one as a witness who had been cured, the jury was justified in finding that the cure was worthless, and that a note given for the right to sell it in a certain territory was without consideration.—*Idem*.
- Fires**—See ¹⁴, ¹⁶, *ante*.
19. **Flight—Seduction and Breach of Promise**—At the time when the defendant is said to have left the county no suit had been begun or threatened and defendant returned as soon as he learned of the suit. *Held*,
 - a. Whatever the rule may be in actions for seduction, such evidence is not admissible when the gist of the action is breach of promise or contract.
 - b. Without deciding whether evidence of flight is admissible in a civil case, it should not have been received here.—*Wise v. Schloesser*, 16.
- Fraud**—See ⁵, *ante*.
20. **Harmless Error**—It appearing that another witness was permitted, without objection or contradiction, to testify to the same fact, error, if any, in admitting the testimony was harmless.—*In re Myers Estate*, 584.
 21. **SAME**—Though it was error to allow decedent's executrix to introduce an item in the ledger used in the business which plaintiff claimed to have intrusted to her decedent, and which the executrix claimed he had purchased from plaintiff, for the purpose of showing cash payment to him, such error was harmless, where plaintiff admitted receiving the money.—*Idem*.
 22. **HARMLESS REJECTION**—The erroneous rejection of evidence was harmless, where the facts sought to be proved were otherwise fully shown during the trial.—*Church v. Bloom*, 319.

EVIDENCE Continued

23. *Same*—Error in excluding evidence is harmless, where the fact sought to be established is proven by other evidence.—*Shambaugh v Current*, 121.
24. *Same*—Refusing to permit witnesses to say whether certain animals were thoroughbred, if erroneous, is not prejudicial, where the same witnesses gave their opinion on the matter in another form, to-wit, by stating that they were not “thoroughbred” and giving reasons for such an opinion.—*Idem*.
25. *Impeachment*—Inquiry as to the reputation of a witness should be restricted to the neighborhood of his present residence and to proof of reputation near to the time of trial. If the residence is so recently acquired that his present neighbors are not likely to have ascertained his character and he is not likely to have thrown off the one established in his former abode, his reputation in the former abode may be received and so, if he has subsequently remained in no place long enough to become well known to his neighbors.—*McGuire v. Kenefick*, 147.
26. *SAME*—Evidence as to the reputation of a witness in a town he had left seven years before was inadmissible in the absence of evidence that he had not maintained a residence elsewhere in the meantime.—*Idem*.
27. *Incompetency—Ex Parte Statements*—Where plaintiff sought to recover against an insane person on notes, *ex parte* statements of plaintiff’s agent in a written report of moneys collected and paid out by him as defendant’s guardian, were properly excluded as incompetent.—*Watters v. McGreavy*, 538.
- Insane Persons*—See ²³, ²⁴, *post*.
- Interested Witness*—See ⁴⁷, *post*.
- Legal Responsibility*—See ¹⁵, *ante*.
- Letters*—See ²¹, ⁴⁰, *post*.
- Jury Question*—See ¹⁸, *ante*; ³⁵, *post*.
28. *Parol Evidence—Ambiguity*—A lease providing for \$600 rent to be paid the first year, \$660 for the next two years, and \$720 for the next and last two years, is ambiguous, and parol evidence will be received to show that the rent to be paid the second and third years is \$660 per year.—*American Sav. Bk. v. Shaver Car. Co.*, 137.

Objections—See ²², *post*.

Offer—See ²², *post*.

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EVIDENCE Continued

29. **Personal Transaction With Decedent** — Under Code, section 4604, providing that no party shall be examined as a witness in regard to transactions or communications had personally with a deceased person, in an action against the heir at law, next of kin, or assignee of such deceased person, it is competent, in an action by a widow to recover of her deceased husband's unmarried brother for board furnished such brother while he lived in her husband's family on a farm which the brothers worked together, for the defendant to testify on what terms he lived with his brother.—*McClintic v. McClintic*, 615.
30. **SAME**—Under a statute prohibiting the examination of a party to an action in regard to any personal transactions between such persons and a person deceased at the time of the examination, parties defendant in an action by an heir to quiet title to inherited land, where the defense is made that the land was inherited by a bastard child of the decedent, will not be allowed to testify to transactions, conversations, and illicit relations with deceased.—*McCorkendale v. McCorkendale*, 314.
31. **Letters**—Under a statute prohibiting a party from giving testimony of communications with a person deceased before the commencement of the examination, letters of the deceased written to a party are inadmissible.—*Idem*.
32. **TIMELY OBJECTION**—Where the widow of decedent brought partition and a son claimed title by an oral agreement with deceased, objection to the son's testimony as to personal transactions with decedent need not be interposed to the administration of the oath, since there were matters relevant to the issue on which he was competent.—*Chew v. Holt*, 362.
33. **INSANE PERSON**—Where recovery was sought against an insane person on notes payable to plaintiff's order, plaintiff's testimony that he saw defendant sign the notes was properly excluded, under Code, section 4604, declaring that no party to any action shall be examined as a witness in regard to a personal transaction or communication with a person insane when the action is tried.—*Watters v. McGreavy*, 538.
34. **Same**—Where recovery was sought against an insane person on notes payable to plaintiff's order, and the cashier of a bank at which some of the notes had been executed testi-

EVIDENCE Continued

fied that plaintiff and defendant were always together when the money was loaned by or paid to the bank, and that on one occasion he did not know who received the benefit of money he had handed to them, it was not error to exclude plaintiff's testimony as to such transactions and his partnership relations with defendant at the time, nor his evidence as to what notes referred to in books represented, since its admission would, by indirection, have enabled plaintiff to give testimony incompetent under Code, section 4604, declaring that no party shall be examined as a witness in regard to a personal transaction or communication with a person insane when the action is tried.—*Idem*.

35. **Pleadings as Evidence —JURY QUESTION—*Delivery of Notes—*** Plaintiffs sold defendants certain machinery and gave a written warranty, which provided that failure to settle at the time and place of delivery should be a waiver of the warranty, without affecting the liability of defendants for the price. Defendants gave notes in part payment. In a suit to recover the price of the machinery, a petition for an injunction, under which a writ had issued, restraining plaintiff's agent from turning the note over to plaintiff, was introduced to show that the terms of settlement had not been complied with by defendants, in that they had not delivered the notes to plaintiffs absolutely, but only to their agent in *escrow*. Defendant's amended answer alleged that the notes were given according to contract, though the original answer alleged that they were given in *escrow*: *Held*, that whether an absolute or conditional delivery of notes was made, was for the jury.—*Robinson & Co. v. Berkey & Martin*, 550.
36. **Proving Service of Notice — RETURN—*Affidavit—*** That a notary public, in writing the *jurat* to an affidavit of service of an original notice, utilized affiant's signature to the affidavit as a part of the *jurat*, does not render the proof of service defective.—*Blair v. Hemphill*, 226.
37. **Relevancy—*Act of Third Person—*** W. had an arrangement with a patentee under which he maintained an office to cure with patentee's cure. He brought defendant and another together and, as a result, defendant and that other engaged in a like business, defendant giving to said other a note which was transferred to patentee. In the letter-heads used in W.'s office he was styled "business manager" and, in correspondence patentee addressed him as "manager." *Held*,

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EVIDENCE Continued

W. was not a stranger to the transaction which led to the making of such note but was in such privity to all the parties interested as that, in a suit upon the note, it was proper to admit in evidence conversations had with W. and letters from him to defendant recommending patentee's cure to the person with whom defendant associated and the purchaser of the territory in which to sell said cure, the note being given in consideration of such territory sold to defendant by his associate.—*Wray v. Warner*, 64.

38. *Relevancy*—In an action to recover possession of a drug business, it was error to refuse to allow plaintiff to answer the question what he did with the business when he removed to another state, though he admitted that defendant's testator was in apparent charge thereof after his removal, since the *supervision* of the business might have been intrusted to another person.—*In re Myers Estate*, 584.

Reputation—See ²⁵, ²⁶, *ante*.

39. *Secondary*—AGE—*Leaves from Family Bible*—Leaves cut from a family Bible are admissible to prove the age of a daughter, the weight thereof to be determined by the court, although the entries therein were not made at the time of the birth of the child and were copied from another Bible.—*Hall v. Cardell*, 206.
40. CONTENTS OF LETTER—It was not error to refuse to permit defendant to state the contents of a letter, which he then had in his possession in the court room, and which was immediately introduced and marked as an exhibit.—*State v. Keenan*, 286.
41. *What is not*—Where plaintiff, suing for the possession of a drug business as surviving partner, claimed that he placed it in the hands of defendant's testator, under an agreement that he was to have an interest in the profits for his services, it was not error to allow defendant's witness, after testifying that she had read all the correspondence between testator and plaintiff, to testify in the negative over objection, in answer to defendant's question whether any business matter was mentioned in any of plaintiff's letters to testator, except one read to the jury in which plaintiff had asked to borrow money, since such question did not call for the contents of the letters, but only for their subject-matter, which was admissible for the purpose of identification.—*In re Myers Estate*, 584.

EVIDENCE Continued

42. **DEEDS—Foundation**—Under Code, section 4630, providing that record evidence of a deed may be introduced when the original is shown to be lost, or not belonging to the party wishing to use the same or within his control, such evidence is admissible on proof that the party wishing to introduce the same had made careful search therefor, and failed to find it, and had heard that the deed was in the possession of a former attorney who was in a distant state.—Hall v. Cardell, 206.

Seduction — See ¹⁹. *ante*.

43. **Stating Purpose of Testimony —ANSWER TO REBUTTAL**—Where the character of evidence sought to be introduced after the introduction of the rebuttal does not appear, it is properly excluded as not in response to the rebuttal evidence, since it is the duty of the party to advise the court if the evidence was to be other than defensive.—Stewart v. Anderson, 329.

44. **Statute of Frauds—A MERE RULE OF EVIDENCE**—The statute of frauds does not prohibit an oral contract, nor make such agreement illegal because certain formalities are not complied with, but relates only to the method by which proof may be made in an attempt to enforce it.—Merchant v. O'Rourke, 351.

45. **AGREEMENT NOT WITHIN**—An agreement is held not to be within the statute of frauds, as being a promise to answer for the debt, default, or miscarriage of another.—*Idem*.

Stockholders—See ¹⁷. *post*.

46. **Usage of Trade Locally**—It is error to exclude evidence that the term "dry goods" used in a written contract, bears a meaning, according to the usage of the locality and among business men and merchants in the community in which the stock was located, under which notions, clothing, hats and caps are excluded, since such evidence does not contradict the terms of the contract, but merely applies them to its subject-matter.—Wood v. Allen, 97.

Value — See ¹⁶, *ante*.

Witness — See ¹⁷, *post*.

47. **INTERESTED WITNESS—Stockholder After Transfer**—Where a witness has been an officer and stockholder in plaintiff company, but had resigned and transferred all his interest before the trial, and the company is insolvent, he is not a party interested in the event, so as to disqualify him, under Code, section 4604.—Dubuque Lumber Co. v. Kimball, 48.

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EVIDENCE Continued

TO

FORECLOSURE

EXECUTIONS—See ESTATES OF DECED., ⁵.EXPERTS—See ANIMALS, ⁵, ⁶, ⁷; INSTRUCT., ¹.EXTRADITION—See CRIM. LAW, ¹².FALSE REPRESENTATIONS—See FRAUD, ⁴,FINAL JUDGMENT—See APPEAL, ⁶; STAT. LIM., ⁷.FINDINGS—See JUDGM., ¹⁶, ¹⁷, ¹⁸.**FIXTURES.**

Scales—When Fixtures—Wagon scales to weigh grain, placed on a foundation wall of stone and mortar, on which the platform hung, and from underneath which rods extended under a building used as an office, and up through the floor to the beam from which the weight was ascertained, became a fixture.—Thomson v. Smith, 718.

FLIGHT—See EVID, ¹⁹.**FORECLOSURE.****1. Sale of Chattels —STIPULATION AS TO DAMAGES AND NOTICE—**

Law by Contract—Where a chattel mortgage provides that the mortgagee may take possession and sell the property at public sale without any liability for damages, the mortgagee is not liable, in the absence of bad faith, at least, for selling the property at an advertised public sale, which was not in accordance with Code, sections 4275, 4277, prescribing the methods to be pursued in the sale of mortgage chattels, the provisions of the mortgage constituting a waiver of strict compliance with the statute, and a judgment for the defendant for damages for such sale was erroneous.—Geiser Mfg. Co. v. Krogman, 503.

2. BURDEN OF PROOF—When a chattel mortgage authorizes the mortgagee to take possession and sell the mortgaged property at a public sale whenever he deems himself insecure, and the property is so seized and sold, the court should instruct, in an action between the mortgagor and mortgagee, that the burden is on the mortgagor to show that the sale was not made in good faith, and it is error to require the mortgagee to prove, in the first instance, that he deemed himself unsafe when he foreclosed. This is especially so where no issue was made challenging the maturity of the mortgage debt.—*Idem*.

3. Continuing Foreclosure —What is Not—Where a grantee of lands conveyed by deeds operating as mortgages entered

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FORECLOSURE

TO

FRAUD

into possession of the lands at time of conveyance under an agreement with the grantor that he should hold them as security for a debt not then due, such possession does not constitute a continuing foreclosure so as to enable the grantor to maintain an action to redeem at any time during its continuance, free from limitations; since the right to foreclose did not accrue until the debt was due, and the right to redeem was contemporaneous therewith.—*Adams v. Holden*, 54.

4. NOTICE BY PUBLICATION—*Jurisdiction*—Where defendant conveyed lands, taking the purchaser's notes and mortgage, and foreclosed on failure of the purchaser to pay, and the affidavit on which the original notice by publication was made, stated that personal service could not be made on the purchaser "within this county," the word "county" being used instead of "state," as required by the statute, the court acquired no jurisdiction to render a decree of foreclosure, and a sale thereunder conveyed no title.—*Stillman v. Rosenberg*, 369.

FOREIGN GUARDIAN—See GUARD. AND WARD, 7.

FOREIGN JUDGMENTS—See CONSTIT. LAW, 2; JUDGMENTS, 9 to 16.

FOREIGN LAWS—See CONSTIT. LAW, 5.

FRAUD—See EVID., 5; JUDGM., 20, 21; NEGOT. INST., 2; QUIET. TITLE; SALES, 5.

1. **Fraudulent Attachment** —*Evidence Held Insufficient*—That an attachment was levied in fraud of creditors of the debtor cannot be established by evidence of a general nature, and founded largely upon supposition.—*Perkins v. Lyons*, 194.
2. **EVIDENCE—ADMISSIBILITY**—Where defendant, in his answer raised the issue of fraud in the procurement of a contract to deliver trees to him, evidence as to the value of the trees tendered by the plaintiff in pursuance of such contract was properly admitted, as bearing on its reasonableness.—*Rice v. Appel*, 454.
3. *Same*—It was error to reject defendants' evidence as to the value of the machine and the work it was capable of doing, since such evidence was competent and material to show that it could not do the work plaintiff stated it had done and could still do.—*Merillat v. Plummer*, 643.
4. **False Representation—FACT AND OPINION**—Where defendants, sued on a note given by them for the right to use a fence

FRAUD Continued

TO

FRAUD. CONVEY.

building machine, as to the merits of which they knew nothing, pleaded false and fraudulent representations in the procurement of the note, and want of consideration, the rejection of evidence to prove plaintiff's inducing statements as to the machine's capacity, and the amount of fence that could be built with it, based on plaintiff's own observation and knowledge, was error, since such statements were representations of fact, and not mere expressions of opinion.—*Idem*.

5. **Waiver**—Where defendant, after becoming fully informed of false and fraudulent representations inducing his contract, received benefits thereunder, and made no claim of fraud before the commencement of an action thereon by the assignee of the corporation with which the contract had been made and of which he had become a director, he was not entitled to allege such fraud as a defense to the action.—*Dow v. Alford*, 278.
6. **Want of Consideration — Burden of Proof**—One attaching a fund has the burden, as against the assignee thereof who intervenes, of proving fraud or want of consideration.—*Reineke v. Gruner*, 731.

FRAUDULENT CONVEYANCES.

1. **Bona Fide Creditors—RELATIONSHIP**—In a suit to set aside a conveyance, as fraudulent, made by a son to his father, the relationship of the parties is proper to be considered, but not necessarily indicative of fraud; and the father, being a *bona fide* creditor has a right to secure himself, though he knows that thereby the chances of other creditors to do so will be lessened, provided it is done in good faith.—*Riddick v. Parr*, 733.
2. **WIFE AS CREDITOR**—Where a levy was made on defendant's property under a landlord's attachment, and the defendant executed a mortgage on the property to his wife, prior to the term of the lease to secure the sum of \$300 which she let him have twenty-two years before, and for which she had never before demanded any note or security, the plaintiff's attachment was entitled to priority, since it is evident that there was no intention to treat the three hundred dollars as a debt until the financial embarrassment of the husband suggested it.—*Parriott v. Bowers*, 740.

FRAUD. CONVEY. Continued

3. **Consideration**—In an action to set aside a conveyance as to the grantor's creditors, it appeared that the grantee's mother willed her a sum of money and that her father, the grantor, was named in the will as executor thereof, that he had never paid the grantee such bequest, that the father had boarded with the grantee, and that she had cared for him, but that there was no agreement as to the compensation for such board and care, and no record was kept of it. It did not appear that her mother left any estate from which the bequest could have been paid, or that the father qualified as executor. *Held*, that the testimony showed such an inadequacy of consideration, and a consideration of such doubtful character as to warrant setting aside the conveyance.—Bur. P. H. Assn. v. Gerlinger, 293.
4. **Grantee as Bona Fide Purchaser** A subsequent grantee of lands conveyed by husband and wife in fraud of creditors, who successfully prosecuted a suit to set aside a conveyance to a prior grantee on the ground of fraud, is not entitled to the defense of a *bona fide* purchaser, in an action against him to subject the land to a judgment subsequently recovered against the original grantors.—Joyce v. Perry, 567.
5. **Homestead—UNSELECTED—Lands Including One**—While a conveyance of land used as a homestead will not be set aside as in fraud of creditors, yet, where the homestead might have been selected from a part only of the land conveyed, the balance being subject to the grantor's debts, no homestead having in fact been selected, a decree declaring a judgment against the grantors a lien on the land superior to the rights of fraudulent grantees was proper.—*Idem*.
6. **Insolvency—EVIDENCE**—Where declarations of a debtor to the effect that certain property conveyed by him was all the property he had are proven, it will be presumed, in the absence of evidence to the contrary, in an action to set aside such conveyance, that such conditions continued to exist down to the time of the commencement of the action, and that the debtor had no property from which an execution could be satisfied.—Burlington P. H. Ass'n v. Gerlinger, 293.
7. **SAME**—In an action to set aside a conveyance as fraudulent as to the grantor's creditors, the plaintiff must show that defendant was insolvent when action was brought.—*Idem*.

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FRAUD. CONVEY. Continued

TO

FRAUD. SALE

8. **SAME**—A judgment creditor is not entitled to set aside a conveyance by an insolvent judgment debtor, and to subject the land to payment of the judgment, where it is not shown that other parties to the judgment are also insolvent.—*Riddick v. Parr*, 733.
9. **PLEADING**—An allegation that a conveyance was made in fraud of the rights of the creditor's grantors, and for the purpose of hindering, delaying, and defrauding them, is, in the absence of a motion for a more specific statement, a sufficient allegation that the grantee participated in the fraudulent intent.—*Bur. P. H. Ass'n v. Gerlinger*, 293.
10. **Judgments—How MADE LIENS**—A judgment recovered subsequent to a conveyance of real estate in fraud of creditors is not a lien on the land, and can be made so only by suit in equity, provided the land would have been subject thereto if the title had remained in the debtors.—*Joyce v. Perry*, 567.
11. **Secret Trust—Evidence**—Where a defendant debtor whose real estate is attached has executed a lease and received rent as owner, after the delivery of a deed to his father-in-law, who intervenes in the action, and such deed is not recorded until after the attachment, such circumstances constitute evidence of a secret trust in the intervener in favor of the defendant, and hence an order dismissing plaintiff's petition on the evidence and discharging the levy was erroneous.—*Parlin, O. & M. Co. v. Daniels*, 640.

FRAUDULENT SALE.

1. **Conspiracy**—Where two defendants are sued for complicity in a fraudulent real estate trade, an instruction that, if a conspiracy to defraud is established, then the declaration of either party, made in carrying out the common purpose, is binding on both, is a sufficient limitation of such evidence, in the absence of a request for a more specific instruction.—*Connors v. Chingren*, 437.
2. **Evidence—ADMISSIBILITY—Against One of Two Defendants**—Where two defendants are sued for complicity in a fraudulent real estate trade, evidence of what one of the defendants said and did previous to the trade is admissible against him.—*Idem*.
3. **SAME**—Where, in an action for fraud in a real estate trade, defendant introduces evidence that the stock of goods

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FRAUD. SALE Continued

received in exchange was greatly over valued plaintiff may show that defendant's agent sold the goods at very low prices, as showing a desire to speedily dispose of the goods, and other matters in issue.—*Idem*.

4. SAME—Where, in an action against two defendants for fraud in a real estate trade, one of the defendants claims to have had no interest in the trade, except as mortgagee, a deed of the property from him to the wife of the other, and a mortgage back, are admissible.—*Idem*.
5. IMPEACHMENT—Where two defendants are sued for complicity in a fraudulent real estate trade, and one of the defendants testifies that he did not state to a certain person that the other defendant owned the property received in the trade, testimony that he did make such statement is admissible for impeachment.—*Idem*.
6. OBJECTIONS—Error in the admission of evidence of statements made by one defendant in an action charging complicity of two defendants in a fraudulent real estate trade will not be considered where the record does not show an objection on grounds applicable thereto.—*Idem*.
7. SUFFICIENCY OF EVIDENCE—Defendant H. deeded real estate of the value of four hundred dollars to the wife of defendant C., the deed reciting a consideration of two thousand dollars. The actual consideration, if any was given, was her note for one thousand dollars. The land was marshy and unfit for cultivation. Afterwards C. traded the land to plaintiff for a stock of goods at a valuation of two thousand dollars, after having shown him a different tract of land, which was worth such amount, which he represented as the land he was trading. H. took a chattel mortgage on the stock for one thousand dollars, and released his claim on the land, and afterwards purchased goods for such stock, and moved the stock to another town, and thereafter sold it under his mortgage. There was conflicting testimony of statements made by C. concerning the interest of H. in the property. *Held*, sufficient to sustain judgment against both defendants in an action for damages for fraud in such transaction.—*Idem*
8. INSTRUCTIONS—MUST NOT ASSUME DISPUTED FACTS—Where, in an action charging a mortgagee of a stock of goods with complicity in a fraud by which the mortgagor obtained the goods, the evidence showed that the mortgagee purchased

FRAUD. SALE Continued

TO

GUARD AND WARD

additions to the stock, and had the stock moved to another town, and the court had instructed that, if the past transactions were in good faith, the mortgagee had the right to remove the goods, it was not error to refuse to instruct that, as mortgagee, he had the right to order new goods and to remove the stock, as such instruction assumed the validity of former transactions between the mortgagor and mortgagee, the good faith of which was in dispute.—*Idem*.

9. *Equivalents*—It is not error to refuse to instruct that fraud is not presumed, and that, if the evidence is consistent with fair dealing, the jury should so find, where an instruction is given that, where the evidence is as consistent with an honest purpose as a fraudulent one, the verdict should be for the person charged therewith.—*Idem*.
10. **Measure of Damages** — Where the pleading in an action for damages for a fraudulent real estate trade shows that the parties traded on the basis that the land was of a certain value, an instruction that the measure of damages was the difference between the value of the land received and the value, as represented was not erroneous, in the absence of a request for a more specific instruction, for failure to recognize the actual value as fixed by the parties to the trade.—*Idem*.

GARNISHMENT—See INSUR., ¹⁰; PRACT, ²¹.

GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS.

Standing of Interveners to Attack—Where a mortgage is valid against the assignee for the benefit of creditors of the mortgagor, and is attacked by subsequent creditors solely on the ground of fraudulent agreement between the mortgagor and mortgagee whereby the mortgage was withheld from record to give the mortgagor fictitious credit, such creditors may attack the mortgage by intervening in the suit to foreclose it, and this, though their judgments were subsequent to the assignment, so that they did not become liens on the land, and no execution is thereafter levied on the property or returned *nulla bona*.—Hitt v. Sterling-Goold Mfg. Co., 458.

GOOD CHARACTER—See CRIM. LAW, ²⁶.

GUARDIAN AND WARD—See JUDGM., ²².

1. **Knowledge of Want of Authority** — *Trusts*—There being sufficient evidence to show that one selling a note and mortgage

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GUARD. AND WARD Continued

- to the guardian of a minor knew that he sold to her as such guardian, and received the money of her ward in payment thereof, he is presumed to know whether she had authority to sell, and he holds the money so received in trust for the benefit of the ward.—*Easton v. Sommerville*, 164.
2. SAME—It may be that as between himself and his ward a guardian will not be heard to say that he had no knowledge of the circumstances which established that an unauthorized investment had been made for the ward. But he rests under no duty to one who sold the thing invested in. He, too, is a wrongdoer and cannot insist that the successor of the guardian who made the investment made an election, unless it appears that the acts claimed to evidence an intent to affirm by the said successor were done with knowledge of the truth.—*Idem*.
 3. Election of Remedies—An action against a guardian for conversion, by buying a mortgage with funds of the ward without authority from the court, and an action against one who received these funds with knowledge of such want of authority are not inconsistent, and hence work no election.—*Idem*.
 4. SAME—Election will not be found against a guardian, where, after knowledge of the facts he did nothing which evinced an election to ratify an unauthorized investment, but on the contrary disaffirmed same all he could, including the bringing of a suit to disaffirm —*Idem*.
 5. SAME—As a guardian sues in a representative capacity and can do no act binding on the estate of his ward without authority from the probate court, there is, without deciding the point, much reason for saying that he could not make an election binding on his ward.—*Idem*.
 6. Final Report —A guardian's final accounting should cover the entire period of guardianship, where the intermediate reports filed are incomplete.—*Ellis v. Soper*, 631.
 7. Foreign Guardian of one Insane —*Transfer of Personal Property in Iowa To*—Where a stepmother of an insane person, with whom such person lived after death of his father, and with whom he removed to Nebraska after her re-marriage, and remained, was appointed guardian of such person in Nebraska, and, after the filing of a petition in Iowa by his adopted sister asking appointment of a guardian of his estate, filed a certified copy of her bond as foreign

GUARD. AND WARD Continued

guardian, and application for transfer to her of his personal property, under Code, sections 3216-3218, authorizing a foreign guardian to receive personal property of a ward on the filing of a certified copy of the bond given in the state making such appointment, it was error to dismiss such application, since such foreign guardian stood in the position of *loco parentis* to the ward, her domicile being his domicile, and no substantial reason appeared why she should not care for his property.—Henderson v. Harper, 525.

8. **Laches of Guardian** — A guardian, without authority of the court, purchased a note, secured by mortgage, with funds of her ward. At her death, her successor was appointed, who received interest on the mortgage from the assignor, and redeemed the land covered thereby from tax sale, without knowing that such purchase was made without authority. A short time after learning this, he brought action to rescind the investment, against the executor of the deceased guardian. The estate of said deceased guardian was solvent and unsettled, and no change had taken place in the relation of the parties, and no disadvantage had accrued. *Held*, that the guardian had not been guilty of such laches as would bar relief, although a little more than three years had elapsed.—Easton v. Sommerville, 164.
9. **WHEN NOT ATTACHABLE**—Laches of a guardian in suing for rescission of an investment of his ward's property, made by a former guardian without authority of court, does not give the ward a right of action against him, when no damage has resulted and the judgment obtained in the suit is good and collectible.—*Idem*.
10. **Investment by Guardian — VALIDITY—Order of Court**—Under Code, section 3200, providing that guardians may lease lands, loan money, and in all other respects manage the affairs of their wards, under proper orders of court, an investment of the funds of the ward without an order of the court is voidable until approved by the court.—*Idem*.
11. **Mother as Guardian—SUPPORT OF WARDS BY GUARDIAN'S MOTHER—Equitable Allowance for in Absence of Order of Allowance**—In the absence of an order allowing a widow who is guardian of her children's estate to use the same for their support, a court of equity, on final accounting, will allow her credit for past support, where it is shown that her own estate was insufficient to support them properly.—Ellis v. Soper, 631.

GUARD. AND WARD Continued TO HOMESTEADS

12. *Rule Applied*—A widow having an estate worth \$11,500 and an annual income of \$1,100 for the support of herself and children, for whom she is guardian, should be allowed only the income of their estate towards their support and education, when the estate of each is only \$1,800, since she is primarily liable for their support during minority.—*Idem*.
13. *Release of Guardian —When not Conclusive*—A ward is not concluded by a release acknowledging final and satisfactory settlement with the guardian, where it is given without any accounting or settlement in fact, on the mistaken assurance of the guardian that nothing is due, though no fraud or undue influence is practiced in obtaining it.—*Idem*.
14. *Rescission*—A guardian bought a mortgage without authority. The seller and endorser paid \$80 interest to the successor of said guardian who then was ignorant of the facts. After learning the truth, he brought suit to rescind the investment in said mortgage without returning or offering to return said interest payment, but the amount was deducted from the judgment rendered against the seller of the mortgage and the mortgage itself and the mortgage note delivered to the clerk for the use and benefit of the seller. *Held*, the deduction from said judgment sufficed for return or offer to return and the endorser is in no position to insist that the \$80 should have been returned before suit for rescission was brought, because, in paying it, he did no more than the law required.—*Easton v. Sommerville*, 164.

HARMLESS ERROR—See CRIM. LAW, ²⁷; EVID., ²⁰ to ²⁶; NEGOT. INSTRUMENTS, ⁴; PRACT, ¹¹ to ¹⁶, ²⁸.

HIGHWAYS—See NEGLIG., ³.

HOMESTEADS—See FRAUD, CONV., ⁵.

Divorced Woman—A woman without children, to whom, on the granting of a divorce to her, the homestead of herself and divorced husband was deeded, pursuant to an agreement of the parties that if the decree was granted she should have the property for alimony, has not, though occupying it, any homestead rights therein prior to her subsequent marriage; Code 1873, section 1989, providing that a *widow* or *widower*, though without children, shall be deemed a family while continuing to occupy the house used as a homestead at the date of the death of the husband or wife.—*Clemans v. Penfield*, 511.

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HUSBAND AND WIFE

TO

INSTRUCTIONS

HUSBAND AND WIFE—See FRAUD. CONV., ²; WILLS, ⁴;
WITNESSES, ², ⁴.

1. **Earnings of Wife**—A single and a married brother owned adjoining farms, on one of which they lived in the same house, and farmed both places, under a partnership agreement, that the unmarried brother should furnish half of the family provisions and fuel, and that he should receive his board, washing, ironing, and mending in the family. The married brother's wife lived in the family, and had no other occupation than a housewife. After her husband's death she brought an action against the surviving brother to recover for the services performed in furnishing such board, washing, ironing, and mending. *Held*, that the services of the wife belonged to the husband, and she could not recover.—*McClintic v. McClintic*, 615.
2. **RECOVERY BY WIFE**—*Elements of the Action*—In an action by a widow to recover of her deceased husband's unmarried brother for board furnished him while he lived in her husband's family, on a farm, which the brother's worked together, under an agreement that the unmarried brother should receive his board and should furnish one-half of the family provisions and fuel, during which time the wife had no other occupation than that of a housewife in the family, she must allege and prove an express agreement by the defendant to pay her therefor, to which her husband consented.—*Idem*.

IMPEACHMENT—See CRIM. LAW, ¹¹; EVID., ²⁵, ²⁶; FRAUD. SALE, ⁴;
INSTRUCT., ².

INCLUDED OFFENSES—See CRIM. LAW, ²⁸.

INDICTMENT—See CRIM. LAW, ¹², ¹³ to ¹⁶, ¹⁹.

INDORSERS—See NEGOT. INSTR., ⁵, ⁸.

INFANTS—See DEEDS, ² to ⁶.

INFECTIOUS DISEASES—See BOARD OF HEALTH.

INJUNCTIONS—See BOARD OF HEALTH, ²; DRAINAGE; EQUITY, ⁴;
JUDGMENT, ¹⁹; TAXATION, ².

INSANITY—See CRIM. LAW, ¹⁶; DEEDS, ¹; EVID., ³³, ³⁴; GUARD. AND
WARD, ⁷; POOR, ².

INSOLVENCY—See FRAUD. CONV., ⁶, ⁷, ⁸; TRUSTS, ⁴.

INSTRUCTIONS—See APPEAL, ⁴¹, ⁴², ⁴³, ⁵⁷, ⁵⁸, ⁵⁹; CRIM. LAW, ⁷, ²⁰, ⁴¹;
DAMAGES, ¹, ⁴; FRAUD. SALES, ¹, ⁸, ⁹, ¹⁰; PRACT., ⁶ to ¹⁶; WAR-
RANTY, ⁴.

Small figures refer to subdivisions of Index. The others to page of report.

INSTRUCTIONS Continued

1. **Expert Testimony—*On Value of***—Where veterinary surgeons, in an action for the sale of diseased hogs, testified respecting hog cholera, and that the conditions of the hogs in question indicated that they had the disease, it was error to instruct that expert evidence is made up largely of mere theory and speculation, and that the law recognizes expert testimony as the lowest order of evidence.—*Brush v. Smith*, 217.
2. **Impeachment—*Must be Requested***—Where there was no instruction asked limiting the effect of impeaching evidence, the failure to give such instruction was not error.—*Connors v. Chingren*, 437.
3. **Jury not Misled** - Where, in reply to an answer denying defendant's signature to a note, plaintiff pleads certain facts as constituting an estoppel, and also pleads a portion of the same facts in an amended petition as constituting ratification and adoption of the signature and the court instructs that, as no evidence had been offered in support of the reply, the jury should disregard it, but also instructs fully and fairly on the issue of ratification, the instruction as to the reply is not erroneous, as leading the jury to believe that the facts pleaded therein could not be considered for any purpose, though the jury began a request for further instructions by an unfinished sentence to the effect that, "having failed to determine how much of the reply they should disregard," they request further instructions as to ratification and adoption.—*Renner Bros. v. Thornburg*, 515.
4. **Negligence**—An instruction that plaintiff could not recover for loss to his own hogs, in an action for the sale of diseased hogs, if he negligently permitted the diseased hogs to be mixed therewith, was not erroneous, as eliminating the question of the plaintiff's knowledge of the condition of the purchased hogs, as it is to be considered in determining his freedom from negligence.—*Brush v. Smith*, 217.
5. **Pleading—*Review on Appeal***—It is error, in an action to recover for injuries resulting from a bite of defendant's dog, to instruct that plaintiff might recover for such physical suffering as appeared from the evidence reasonably certain to occur in the future, when no claim for damages for future pain was made in the petition, and no evidence was introduced tending to prove that she was likely to suffer any.—*Van Bergen v. Eulberg*, 139.

INSTRUCTIONS Continued

TO

INSURANCE

6. **Province of Jury** —Expressions in the instructions that "evidence has been introduced tending to show" certain facts which were in issue, were not objectionable as intimating to the jury the opinion of the court concerning the issues. *State v. Donovan*, 61 Iowa, 370, and *State v. Dorland*, 103 Iowa, 174, distinguished.—*State v. Baughman*, 71.
7. **Repetition Needless**—The refusal of an instruction is not error when the instructions given correctly instruct the jury on the same point.—*Shambaugh v. Current*, 122.

INSURANCE.

1. **Fire Insurance**—BEGINNING OF SUIT BY ISSUING SUMMONS—*Statute of Limitations*—Under Revised Statutes Wisconsin, section 4240, providing that an attempt to commence an action by delivering a summons to an officer for service shall be equivalent to a commencement thereof within the meaning of the provision of law limiting the time for the commencement of an action, an action on a fire policy which provides that action shall be instituted in six months after loss, is commenced in time when the summons was issued before, but was not served till after the expiration of such time.—*Fred Miller Brew. Co. v. Ins. Co.*, 590.
2. **EVIDENCE**—*Contradiction by Declarations*—Where a witness for the company claimed to own some of the property destroyed, for which a claim for insurance was made by plaintiff, it was error to refuse to admit previous declarations of such witness in relation to the ownership of the property.—*Petty v. Mutual Fire Ins. Co.*, 358.
3. **Conflicting Evidence on Value**—*Jury Question*—Where there was conflicting evidence as to the value of certain personal property destroyed, the question should have gone to the jury.—*Idem*.
4. **FALSE SWEARING**—*Directed Verdict*—Where a fire policy contained a provision that it should be void in case of false swearing by the insured on any matter relating to insurance, and there was testimony that mis-statements in the proof of loss were made through mistake, it was error to take the case from the jury, as the policy was only void for willful false swearing, with intent to defraud.—*Idem*.
5. **FORFEITURE**—*Illegal Saloon in Building*—A policy on a building and on property contained therein is not avoided by the fact that a saloon therein is not run in strict compliance with law.—*Idem*.

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INSURANCE Continued

6. **LIMITATION BY CONTRACT—*Is Matter for Defense***—Where a fire policy limits the time for commencing action thereon, it is not necessary that the complaint should allege that it was commenced within such time, as this limitation is a matter of defense.—*Fred Miller Brew. Co. v. Ins. Co.*, 590.
7. **INCREASE OF HAZARD—*Plea and Evidence***—Where the legality of a business conducted on the destroyed premises was not in issue, it was error to allow a witness to testify that an unlawful business increased an insurance risk.—*Petty v. Mutual Fire Ins. Co.*, 358.
8. **MISREPRESENTATION OF RISK—*Jury Question***—Where the agent of an insurance company was in the building insured when the application was written, and the nature of the business therein was talked over, and the policy recited that a tenant used the building for a saloon, there was no misrepresentation as to its occupancy which would warrant taking the case from the jury.—*Idem*.
9. **MORTGAGEE—*Loss by Fire Payable to***—Where a mortgagor and mortgagee had stipulated that the loss payable under a fire policy should go to the mortgagee, judgment in an action thereon should be awarded to the mortgagee.—*Fred Miller Brew. Co. v. Ins. Co.*, 590.
10. **Foreign Insurance Companies — NOTICE OF GARNISHMENT ON STATE AUDITOR**—Code, section 1722, requires a foreign insurance company to file an agreement that service of process on the state auditor shall be binding on it, as a condition precedent to the right to do business in the state. *Held*, that where a foreign insurance association transacted no business within the state between the date it received proof of a member's death,—the benefits being payable 90 days thereafter—and the day when the required agreement was filed, the auditor had no authority, during such interim, to receive service in garnishment in an action against the member's beneficiary, and, hence, the beneficiary's motion to discharge the association for want of jurisdiction was properly sustained.—*Greaves & Co. v. Posner*, 651.
11. **Mutual Insurance Associations — CONSOLIDATION AGREEMENT—*Not an Insurance Contract***—Where a mutual insurance association transferred its membership to another association under an agreement that the latter should carry out the insurance contract of the former, such arrangement was not an agreement to insure, within Code, section 1767, pro-

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INSURANCE Continued

- hibiting such an association from insuring a person over sixty-five years of age, and hence the fact that a member of the association whose membership was so transferred was over sixty-five years of age at the date of the agreement did not release the latter association from liability on his certificate.—*Cathcart v. Equitable M. L. Ass'n*, 471.
12. **CONTRACTS—*Ultra Vires***—Where an assessment life insurance association insured a person, by reinsurance, without medical examination as required by its by-laws, it cannot resist payment on the certificate for such reason, as a corporation may waive the provisions of its by-laws.—*Watts v. Equitable M. L. Ass'n*, 90.
 13. **CONSTRUCTIVE NOTICE OF CHARTER TO BENEFICIARY**—Where the amount of the assessments provided for in an insurance contract was lower than permitted by the charter of the association, the insured is not charged with constructive notice of the articles of incorporation, so as to preclude a recovery on his contract.—*Idem*.
 14. **DUTY TO ASSESS—*Estoppel to Deny***—Where a mutual insurance association received a transfer of all of the members and property of another association, and collected assessments from them as its members, under a contract to perform the former association's obligations and that the mortuary fund contributed by the members who should thereafter join the consolidated association should inure to all the members, it was estopped to refuse to levy an assessment on its members joining after the consolidation, to pay beneficiaries of a member of the former association, on the ground that the contract was *ultra vires*.—*Cathcart v. Equitable M. L. Ass'n*, 471.
 15. **Interest**—Where a mutual benefit association failed to levy an assessment for the payment of a death loss as provided in a policy, interest should be allowed from the time of the breach.—*Christie v. Iowa Life Ins. Co.*, 178.
 16. **ESTOPPEL—*Executed Contract***—An assessment insurance company entered into a contract of reinsurance, by which the amount of the assessments to be paid by the assured was lower than the rate fixed in its charter. The assured paid all assessments and in every way fulfilled his contract. *Held*, that as the company had received the benefits from such contract, the matter was within the general scope of its powers, no law was broken or public policy infringed,

INSURANCE Continued

- it would be estopped from denying its liability thereon.—
Watts v. Equitable M. L. Ass'n, 90.
17. LACHES OF INSURER IN ASSESSING—*Relief in Equity*—When, through no fault of the beneficiary, an assessment under the policy of a mutual life association has failed to produce sufficient funds and enough would have been produced had the assessment been made when it should, and as ordered in another action, the beneficiary may have judgment in equity for what he lost by failure to assess at the proper time.—Christie v. Iowa Life Ins. Co., 178.
18. MISCONSTRUCTION OF CONTRACT BY INSURER—The fact that an insurer mistakenly deals with its contract as limiting the number of assessments permitted annually to a number less than is permitted by the laws regulating the insurer, will not sustain the defense of *ultra vires*.—Watts v. Equitable M. L. Ass'n, 90.
19. PAYMENT OF DEATH LOSSES—*When application of Trust Property not Required*—Where a mutual insurance association, which had issued certificates to its members requiring it to levy a per capita assessment at a member's death, and apply the proceeds, not exceeding two thousand dollars, to its beneficiaries, transferred its membership to defendant association under an agreement that its members should be entitled to full rights as members therein, the beneficiaries of a transferred member were not entitled to compel defendant to apply property transferred to it in trust to carry out the terms of the agreement in the absence of proof that such application was necessary to pay the beneficiaries' claim.—Cathcart v. Equitable M. L. Ass'n, 471.
20. REINSURANCE CONTRACT—*Construction*—Where a mutual insurance association received the membership of another association under an agreement that the mortuary fund contributed by the members who should *thereafter* join the consolidated association should inure to the benefit of members of both associations, the beneficiaries of a member of the transferred association were not entitled to compel an assessment on *all* the members of the consolidated association to pay the death benefit of their insured, since such agreement, inferentially, excluded those who became members of the reinsuring association before the consolidation.—*Idem*.
21. *Advances by Reinsurer—Reimbursement*—Where a consolidated mutual insurance association drew from its mor-

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INTOX. LIQ.

tuary fund, acquired before consolidation, to pay death benefits of members of the former association, it was entitled to apply assessments levied on the former association's members to reimburse the fund, as against the beneficiaries of former association members.—*Idem*.

INTEREST—See INSUR., ¹⁵; LAND. AND TEN., ⁵.

Where plaintiff's claim is based on two items falling due at different times, and on interest thereon computed up to the time of filing suit, he should not be allowed interest on the entire amount, but only on the two items from the dates when they fell due.—*Dubuque Lumber Co. v. Kimball*, 48.

INTERROGATORIES—See PRACT., ²⁶, ²⁷.

INTERVENTION—See PRACT., ¹⁶; STATUTE OF LIM., ⁷.

INTOXICATING LIQUORS—See CRIM. LAW. ¹⁸ to ²³.

1. **Contracts—Sale by Non-Resident**—Where the traveling salesman of one who deals in intoxicating liquors in another state, his authority being limited to take orders subject to the approval of his employer, receives an oral order for whisky to be shipped from such other state, and paid for by the vendee by giving the price to the salesman, or by remittance to the vendor, the contract, not being completed until accepted by the vendor, there is no contract made in this state, and in contravention of the laws of this state against the traffic in intoxicating liquors, although the purchaser was not aware of the limitation on the salesman's authority; no attempt being made to mislead him in this regard.—*Sachs & Sons v. Garner*, 424.
2. **Mulct Law—APPEAL FROM ACTION OF BOARD OF SUPERVISORS—Appearance of County Attorney**—On an appeal by a citizen, under Code, section 2450, to a district court, from a finding by a board of supervisors that a statement of consent to the sale of intoxicating liquors in the county is sufficient, it is proper for the county attorney to appear against the statement in the district court, and Code, section 2450, requires him to so appear.—*Green v. Smith*, 184.
3. **Jury Trial on Appeal**—An appeal to a district court from a finding by a board of supervisors as to the sufficiency of a statement of consent to the sale of intoxicating liquors is not triable by a jury.—*Idem*.
4. **REVOCATION BY SIGNER OF CONSENT PETITION**—Under Code, section 2450, providing that statements of consent to the sale

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of intoxicating liquors in a county shall be canvassed by the board of supervisors after ten days' notice, and that its findings shall be effectual until revoked, a voter who has signed such statement can withdraw his consent after it is filed, and before it is acted on by the board.—*Idem*.

5. VIOLATION—*Cold Storage*—The maintenance of a cold-storage warehouse wherein intoxicating liquors are kept for sale, and the filling of orders from such warehouse is a violation of the mulct statute and may be enjoined.—Carter v. Fred Miller Brew. Co., 457.

6. *Single Door*—Where liquors are sold at wholesale and retail in a single room in the same building, and the liquors sold at wholesale were delivered from a cellar through an outside cellar door, instead of from the room above, where the retail business is carried on, and which is connected with the cellar by a door in the floor, leading to a flight of stairs running to the cellar, where all the liquors are stored, and but one tax on the business is paid, it constitutes a violation of the mulct law (Code, section 2448), providing that the selling or keeping for sale must be carried on in a single room, having but one entrance or exit, and that opening on a public business street.—Powers v. Klatt, 357.

7. *Same*—Under Acts Twenty-fifth General Assembly, chapter 62, section 17, clause 3, providing that the sale of liquors shall be carried on in a single room, having but one entrance on a public business street, and that compliance with conditions therein is a bar to prosecution under the prohibitory law; and section 19, declaring that on violation of such provisions, persons engaged in the business shall be liable to prosecution for penalties provided, where defendant caused a door to be opened from a single room in which he conducted his saloon into a back room, where he stored liquors, and through which he carried beer and ice to the saloon, it was not error to grant perpetual injunction from carrying on a liquor nuisance, as the statute was violated by maintaining such door, though only for the convenience of the proprietor and his employees.—State v. Gifford, 648.

8. *Attorney Fee on Appeal*—In an action for an injunction to abate a liquor nuisance, the attorney is herein and on appeal allowed a fee of \$25.00 in this court.—*Idem*.

9. *Mistake of Law no Defense*—Defendant's violation of law through mistake of law furnishes no excuse.—*Idem*.

JUDGES—See APPEAL, ²³; PRACT., ¹⁶, ¹⁷.

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JUDGMENTS

JUDGMENTS—See ALIMONY; CONST. LAW, ¹; FRAUD. CONV., ¹⁰
RAIL. ⁹, ¹⁰.

1. **Adjudication—CLAIMS AGAINST ESTATE OF INSOLVENT—*Improper Filing***—A judicial finding that a claim against an estate, assigned for the benefit of creditors, is valid precludes the assignees from resisting payment on the ground that it was not properly filed.—Brooke v. King, 607.
2. **DECREE LEFT OPEN**—A decree expressly continuing a case for such relief as might prove essential to the protection of the plaintiff's rights was a final adjudication only as to the issues decided.—Christie v. Iowa Life Ins. Co., 178.
3. **MATTERS NOT CONSIDERED IN FORMER SUIT**—Plaintiff sold defendant real estate for one hundred dollars cash, and four hundred dollars to be paid on delivery of a warranty deed, an abstract showing good title, and a note for five hundred dollars, to be executed at the same time. On refusal of defendant to carry out the agreement because of alleged insufficiency of title, plaintiff brought an action for the nine hundred dollars and prayed for a vendor's lien and obtained a decree for four hundred dollars, and that the defendant execute him a note for five hundred dollars, which was done by agreement of the parties, on dismissal of defendant's appeal. *Held*, that in a subsequent action by plaintiff to recover on the note so executed and for a vendor's lien, the decree in the former action did not constitute an adjudication of plaintiff's right to the lien, since in the former action the court had no occasion to pass on the lien.—Zook v. Thompson, 463.
4. **ORDER OF DISCHARGE UPON RELEASE**—An order discharging a guardian pursuant to a release acknowledging final settlement, given without any settlement in fact, on the mistaken assurance of the guardian that nothing was due, is not an adjudication or an accounting, and hence is not a bar to an action by the ward, for an accounting.—Ellis v. Soper, 631.
5. **PARTY BROUGHT IN TO DEFEND—*Pleading***—The German Savings Bank drew its check on the Citizens' National Bank, making same payable to Q. His endorsement was forged, the forger presented it to and obtained its payment of the City Bank. This bank then endorsed the check for collection and forwarded it to said Citizens' National Bank, the drawee, by which it was paid. The drawee bank charged this amount

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JUDGMENTS Continued

to the account of the drawer, the said German Savings Bank. When the forgery was discovered, the drawer began suit against the drawee, the Citizens' National Bank. Drawee thereupon notified the City Bank to come in and defend. This it did both by filing a petition of intervention and having its attorney appear for the Citizens' National Bank; judgment was recovered against said Citizens' National Bank and none entered against the said City Bank, intervener. Then the Citizens' National Bank, drawee, began suit to recover of said City Bank, which had paid the check on the forged endorsement, endorsed it to the plaintiff for collection and been repaid by it. Each party contends in this suit that the suit in which judgment was entered against the Citizens' National Bank and not entered against the City Bank was a complete adjudication of the liability of said City Bank. *Held*, while one liable over may be concluded by a judgment in a suit which he is duly requested to defend, it does not follow that a judgment may therein be entered against the person so brought in. Ordinarily this may not be done, for though he have the right to appear and defend as a party he does not become such and is not liable to the plaintiff in the action. (b) Since, then, no judgment could rightfully have been entered against the City Bank in the suit into which it was brought, the failure to enter, there, judgment against it was not an adjudication that the Citizens' National Bank might not recover of the City Bank as for money paid an endorser who had acquired the paper paid by a forged endorsement. (c) The contention of the defendant that its pleadings in the former case impliedly invoked jurisdiction of the court to enter judgment against it is not sustained by a showing that the petition of intervention asked that it might be made a defendant, answer, "and thus preserve its rights to make full defense against all persons and claims which may be asserted against it in this litigation." (d) The City Bank is bound as to all defenses which were adjudicated in the suit into which it was brought and in which it intervened.—*Citizens' Nat. Bk. v. City Bk.*, 211.

6. PARTITION JUDGMENT—*Accounting Subsequent*—A decree partitioning real estate, fixing the interest of the parties, and ordering its sale, is an adjudication of such matters, although no sale was had; but an accounting up to date and the striking of a balance between the parties is justified in a subsequent action for partition.—*Moy v. Moy*, 161.

JUDGMENTS Continued

7. *Same*—A partition of real estate was had, and sale ordered, which sale was never made. In a subsequent suit for partition of the same property an accounting was decreed between the parties, and items of expenditures and improvements made prior to the first decree were allowed. *Held*, erroneous.—*Idem*.
8. INVESTIGATING TITLE—A decree in an action to quiet title rendered against a lienholder having the right to redeem from a prior incumbrance through which the plaintiff acquired title by foreclosure proceedings, constitutes a bar to the lienholder's right to maintain an action to redeem from such incumbrance.—*Blair v. Hemphill*, 226.
9. Foreign Judgment —RECOGNITION IN SISTER STATE—Where a court of a sister state acquires jurisdiction over the defendant and subject-matter of a suit, and a procedure valid in such state is followed, the judgment will be recognized in other states as binding on the parties thereto.—*Fred Miller Brew. Co. v. Ins. Co.*, 590.
10. *Rule Applied*—A Wisconsin judgment, entered by the clerk of court, in a default case, on the filing of the summons and complaint and proof of service of summons, and that no answer or demurrer had been filed, as authorized by Revised Statutes Wisconsin, section 2891, is entitled to due recognition in the courts of sister states, as it is a judicial act within the meaning of the constitution of the United States.—*Idem*.
11. *Validity of Default Judgment*—Revised Statutes Wisconsin, section 2891, authorizes the clerk of court to enter judgment of default in an action on contract, for money only, when the plaintiff files with the complaint and summons proof of service of the summons and that no demurrer or answer has been filed. Section 2633 provides that, if a copy of the complaint was not served with the summons, the defendant can obtain one by a demand in writing. A summons was served on November 2, 1888, and was filed with the clerk November 10, 1888. On December 31, 1899, plaintiff filed a complaint and proof of the service of summons, and proof that no answer or demurrer was filed; and judgment was entered. No copy of complaint was served on defendant. *Held*, that such judgment was valid.—*Idem*.
12. *Same*—In an action on a foreign judgment the court will not inquire whether the original action was by or against all the proper parties.—*Idem*.

JUDGMENTS Continued

13. **MOTION TO CHANGE PLACE OF TRIAL TO PROPER COUNTY—*Not Essential to Validity of Judgment***—Where there was no motion made to remove a case commenced in the wrong county in Wisconsin to the proper county, as authorized by Revised Statutes Wisconsin, section 2621, a judgment entered in the county where the suit was brought was valid.—*Idem*.
14. **WAIVER—*Failure to Object***—Where a judgment was within the facts of the complaint, and a defect of parties was apparent on its face, it was waived by a failure to object.—*Idem*.
15. **Form**—In a suit by a guardian seeking to declare invalid an investment made by his predecessor in which suit the ward intervened, it was ordered that he make a deposit with the clerk for the benefit of the ward and that upon so doing he be discharged and his bond exonerated, and it is intimated that the validity of such judgment might be objectionable were its form complained of.—*Easton v. Sommerville*, 164.
16. **WHEN FINDINGS BECOME ONE**—A finding of facts, together with conclusions of law filed by a trial judge with the clerk, is not a judgment, until actually spread on the court records.—*Christie v. Iowa Life Ins. Co.*, 178.
17. ***Conflict Between***—Where a judgment does not coincide with the views of the trial judge, as expressed in such a finding, it will be presumed that the judge has changed his views, rather than that the record is not right.—*Idem*.
18. **Modification of Judgment—*Effect on Pending Appeal***—A judgment was entered against a defendant and his guardian, and both defendants appealed. Pending appeal, plaintiff obtained a modification of the judgment by the rendition of a second judgment, which defendants also appealed from. The modifying judgment obtained by plaintiff made no changes except two which were in favor of defendants and which eliminated two things complained of in defendant's appeal from the judgment first rendered. Appellants brought up the evidence on the first appeal and nothing but the record made on the modifying judgment, on the second appeal. *Held*, while appellee was entitled to have the first judgment corrected after same was appealed from, defendants' appeal still stood, and the evidence was properly brought up on that appeal. The effect of the correction obtained by appellee was to require appellee to bring up the corrected record as part of the appeal then pending.—*Culbertson v. Salinger*, 447.

JUDGMENTS Continued

19. **Restraining Collection of** — Collection of a default judgment will not be enjoined where defendant's liability could have been fully determined by proper action on his part, either in the original action or in a subsequent action to set aside a fraudulent transfer of his property to defeat collection thereof.—*Murphy v. Cuddihy*, 645.
20. **Vacation—FRAUDULENT DEFAULT JUDGMENT—Setting Aside—** Plaintiff, being indebted to defendant, gave him an order on a club, which the club accepted, but failed to pay. Suit was brought on the order against plaintiff and the club and, on the return day, defendant's attorney assured plaintiff that defendant was not seeking to hold him liable, that he need not appear, and that the suit would not be called until two days later, and the next day telephoned him that it would not be taken up the following day. About a month thereafter defendant procured a judgment against plaintiff, by default, which he made no attempt to enforce until two years thereafter. *Held*, that such judgment had been procured by deception, and would be set aside, though plaintiff's application therefor, in which he pleaded a good defense to the action, was not filed within a year after the judgment was entered.—*Beck v. Juckett*, 339.
21. **NEW TRIAL SHOULD RESULT**—Where a default judgment was set aside, as procured by deception, the court should have ordered a new trial as part of its decree.—*Idem*.
22. **MINORS—Breach of Promise**—Code, section 3482, provides that no judgment can be rendered against a minor, unless defended by his regular guardian, or one appointed by the court. *Held*, that a judgment for breach of marriage promise rendered against a minor, without a defense by a guardian, was erroneous.—*Wise v. Schloesser*, 16.
23. **SAME**—Where, in proceedings to vacate a judgment against a minor for breach of promise and seduction, not defended by a guardian, it was admitted that he had a meritorious defense to the seduction and the judgment was vacated as to the breach of promise, it was error to sustain that portion of the judgment which was founded upon the alleged seduction, though an action for seduction will lie against an infant without defense by guardian.—*Idem*.
24. **"Error Appearing in the Record" Defined**—Under Code, section 4091, providing that the district court may vacate a judgment against a minor, for erroneous proceedings, unless

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the error appears on the record, if application is made therefor within a year after the minor attains his majority, a minor is not precluded from maintaining such a proceeding, commenced within the year, by the fact that he testified in the former case that he was not 21 years old; as this was not part of the record, in the sense of this statute.—*Idem*.

25. **Satisfaction—SETTING ASIDE SATISFACTION BY ATTACHMENT SALE**—Where satisfaction of a judgment in attachment was entered on payment from the proceeds of a sale of the attached goods, and thereafter the holder of a chattel mortgage on such goods, executed by defendant, recovered judgment against the sheriff for the value thereof, which was paid, an application to set aside such satisfaction was properly denied.—*Kinports v. Oberholtzer*, 744.

JURISDICTION—See **APPEAL**, ²⁰.

JURORS—See **CRIM. LAW**, ¹⁷; **NEW TRIAL; PRACT.**, ¹⁸, ¹⁹, ²⁰.

1. **Attendance—Control of Court Over**—Code 1873, section 233, providing that if, in the judgment of the court, the business does not require the attendance of all or a portion of the trial jurors, such portion as the court deems proper may be discharged, does not prevent the court from merely excusing the jury from attendance for a stated period when their services are not needed.—*Venett v. Jordan*, 409.
2. **COMPENSATION**—Under Code 1873, section 3811, providing that jurors shall receive for each day's service or attendance in courts of record two dollars, members of the regular panel of petit jurors cannot recover compensation for a definite period during which they are excused by the court from attendance.—*Idem*.

JURY TRIAL—See **INTOX. LIQ.**, ².

LACHES—See **EQUITY JUR.**, ²; **GUARD. AND WARD**, ⁸, ⁹; **INSURANCE**, ¹⁷.

LANDLORD AND TENANT.

1. **Conversion by Tenant —Pleading**—Under Code, section 2992, declaring that a landlord shall have a lien for rent on all crops grown on the leased premises for six months after the expiration of the term, a petition to recover for the conversion of oats raised by the tenant on the premises leased, and sold by him to defendant, alleging the making of the lease at an agreed and unpaid rent, the raising of the oats during the term, and showing suit brought within

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LAND AND TEN. Continued

- six months after the rent accrued was not demurrable for failure to allege that the landlord's claim had been adjudicated and his lien established.—*Church v. Bloom*, 319.
2. **ESTOPPEL**—In action for conversion of oats on which plaintiff had a landlord's lien for unpaid rent, evidence that the tenant had sold defendant grain in previous years, while he had held the land under similar leases, was insufficient to estop plaintiff from asserting his lien on the oats, where defendant, when purchasing the grain previously sold, had no knowledge where it had been raised or that it had been grown on leased land, and it appeared that the landlord had not relied on the tenant's personal responsibility.—*Idem*.
 3. **EVIDENCE**—Where land was leased by separate and independent leases for each of several years, evidence that the tenant had sold live stock raised on the land, prior to the year for which suit was brought to enforce the landlord's lien for unpaid rent, was inadmissible, since such live stock was covered by a different lien from that relied on.—*Idem*.
 4. **ORDER OF PROOF**—In an action by a landlord for the conversion of oats raised on the leased premises, against which the landlord had a lien for unpaid rent, and sold by the tenant to defendant, the rejection of the defendant's offer to prove that the tenant had sold hogs raised on the premises during the lease term was proper, in the absence of an offer to show that plaintiff had notice of such sale.—*Idem*.
 5. **Interest**—On the expiration of a lease in August, 1891, a settlement was made providing that the lessee should leave on the premises property equal in value to that which was there when he entered there. By subsequent leases the term was extended to January, 1892. *Held*, that interest on the difference in value of the property left should be computed only from 1892.—*Dubuque Lumber Co. v. Kimball*, 48.
 6. **Lessee Holding Over—Rent**—After the expiration of the lease under which the lessee agreed to pay \$5 per day, he held over for thirty days, and then took a new lease at the rate of \$2.50 per day. *Held*, that for the period between the two leases, the lessee was liable for the rent fixed in the former.—*Dubuque Lumber Co. v. Kimball*, 48.
 7. **Lien—Property of Member of Partnership**—Under Code, section 2992, providing that a landlord shall have a lien on all crops grown on the leased premises, and any other personal property of the tenant used and kept thereon, indi-

4 LAND. AND TEN. Continued

vidual property of one member of a firm used and kept on the leased premises, is not subject to the landlord's lien for rent due from the firm.—Ward v. Walker, 611.

8. SAME—The lien for rent under a tenancy at will, resulting from possession after the termination of the written lease, reaches ahead only for the length of time necessary to end a tenancy by notice, and such lien is junior, as to rent described below, to that of a mortgage on property kept on the leased premises, which mortgage is executed after the termination of the written lease and prior to the accrual of rent due.—German State Bank v. Herron, 25.
9. *Rule Applied*—On April 24, 1896, a tenant at will executed a chattel mortgage on his personal property located on the leased premises. The landlord conveyed the premises to a trustee on January 1, 1898, and also assigned to the trustee unpaid rent. The rent was paid until January 1, 1897. On April 26, 1898, the trustee instituted proceedings for the recovery of the rent, aided by a landlord's attachment. The property attached was replevied by the plaintiff under his chattel mortgage. *Held*, that under Code, section 2991, requiring thirty days' notice in writing, to terminate a tenancy at will, the lien of the landlord for unpaid rent reached ahead only for the term required to terminate the tenancy, and hence the lien of the plaintiff was superior to that of the landlord.—*Idem*.
10. Tenancy at Will - Possession After Termination of Written Lease—Where a tenant from year to year continues in possession of leased premises with the assent of the landlord, after the termination of the lease, he becomes a tenant at will, under Code, section 2991, providing that any person in possession of real estate with the assent of the owner is presumed to be a tenant at will until the contrary is shown. The contract creating the relation of landlord and tenant is implied in every respect as before save that of duration, and payment was due as provided in the written lease.—*Idem*.
11. NOTICE TO TERMINATE—*Sale of Premises*—Under Code, section 2991, requiring that thirty days' notice in writing must be given by either party, to terminate a tenancy at will, the conveyance to one as trustee, by the landlord of premises held by a tenant at will does not terminate the tenancy.—*Idem*.

LAND. AND TEN. Continued

TO

LIBEL

LAW OF SISTER STATE—See JUDGM., ° to 16.

LEVY—See ATTACH. LEVY 2, 3, 4.

LIBEL.

1. **What is**—Complainant was a county superintendent of schools, and defendant published of him that there had not been a meeting of teachers in the county at which complainant had presided, at which the rules of common decency had not been outraged; that defendant was irreligious, an infidel, and an unbeliever; that he was dishonest; that it was known that he opposed the petition of the people who desired Congress to legislate so as to have Almighty God in the Constitution; and that it was generally believed that defendant contributed an article that was a disgrace to any decent man. *Held*, that on a trial of the prosecution for libel, the court properly charged the jury that each of the statements was, of itself libelous, and warranted conviction, unless justified, since the statute defines libel to be the malicious defamation of a person, tending to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence and social intercourse.—State v. Keenan, 286.
2. **Damages—Jury Question**—Where plaintiff's name and address were published as that of the complaining witness in a seduction case, in an article reporting the proceedings, which were in fact brought by another party, thereby falsely imputing want of chastity to plaintiff, an instruction that the law presumes damage and legal malice in such a case, and the verdict should be for the plaintiff, and the only question for the jury to determine was the amount of such damages, was proper, since the publication was both actionable and false.—Hulbert v. New Nonpareil Co., 490.
3. **EXEMPLARY DAMAGES**—The question of exemplary damages was properly submitted to the jury, since it was their province to say whether the action of defendant showed such a want of care as to constitute malice.—*Idem*.
4. **Evidence**—On trial of a prosecution for libel it was proper to reject the testimony of a minister as to the propriety of an article not in evidence, but which it was claimed was published from a printing office in which complainant at one time worked.—State v. Keenan, 286.
5. **MITIGATION**—Where a reporter, in writing up the proceedings in a seduction case, based his article on information received

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LIBEL. Continued

- over the telephone, and on a note the justice left on the reporter's desk, and through mistake published the name and address of an innocent party as the complaining witness, the justice's docket was properly excluded when offered by defendant, in mitigation of damages for libel, since neither the reporter nor the publisher saw the docket prior to the publication.—*Hulbert v. New Nonpareil Co.*, 490.
6. **REBUTTAL**—Where defendant had published that complainant was dishonest, and, on prosecution for libel, defendant, as part of his justification, offered evidence to show that he had failed to pay debts contracted while living in another state, it was proper to ask complainant in rebuttal, as to his family, means, and occupation while there.—*State v. Keenan*, 286
 7. *Same*—Where on trial of a prosecution for libel, after defendant, as part of his justification, had offered to show that complainant at one time had with him a woman of bad repute when his wife was absent, it was proper to allow complainant to show how many children he was taking care of at the time, and their ages, as showing the circumstances surrounding the complainant at the time when it was claimed he was consorting with a lewd woman.—*Idem*.
 8. *Reputation*—Where defendant, as part of his justification, had offered evidence tending to show that complainant had associated with lewd women, it was proper to admit testimony that there was no general talk in the community where complainant lived, that he was of lewd character.—*Idem*.
 9. **Per se**—Where defendant published that complainant was vulgar, such statement, of itself, was libelous, if made in the sense that complainant was low, base, and unfit for the society of refined people.—*Idem*.
 10. **Pleading—Settlement and Satisfaction**—Where in an article reporting a seduction case, the name and address of plaintiff were given, through mistake, as those of the complaining witness, and on the following day the paper published an explanation, evidence that the correction was satisfactory to plaintiff was properly excluded, even without objection made, as it was immaterial on the question of damages; neither settlement nor satisfaction being pleaded.—*Hulbert v. New Nonpareil Co.*, 490.

LIBEL Continued

TO

MECHANICS' LIENS

11. **Privilege**—Where, on trial of a prosecution for libel, defendant claimed that, as the one of whom the statements were made was a candidate for office, the publication was privileged, the court properly instructed the jury that the publication was not privileged unless made for the sole purpose of advising the electors.—*State v. Keenan*, 286.
12. **REPORTING JUDICIAL PROCEEDINGS**—Where a reporter, without seeing the justice's docket, in writing up the proceedings in a seduction case, published that plaintiff was the complaining witness, an instruction that such publication was not privileged because it reported a judicial proceeding was proper, since the reporter identified plaintiff as the complaining witness at his peril, when the record showed it was another party.—*Hulbert v. New Nonpareil Co.*, 490.

LIENS—See *EQUITY JUR.*, ⁸; *FRAUD. CONVEY.*, ¹⁰; *RAIL.*, ⁹, ¹⁰; *SALES*, ⁴.

LIMITATION OF ACTIONS—See *INSUR.*, ⁶; *STATUTE OF LIM.*

LIQUIDATED DAMAGES—See *CONTRACTS*, ¹¹; *DAMAGES*, ⁵.

MASTER AND SERVANT—See *NEGLIG.*, ²; *MUN. CORP.*, ¹².

Assuming Risk of Employment -- Jury Question—Since plaintiff had the right to assume that defendant would furnish him a safe place in which to work, and would inform him of any danger, it cannot be said as a matter of law that plaintiff assumed the risk as incident to his employment.—*Olson v. Hanford Produce Co.*, 347.

MECHANICS' LIENS.

1. **Several Contracts**—Where lumber is furnished between November 18, 1895, and the following March, and a note therefor is given on account, and a payment made thereon, and in the following May more lumber is furnished on a similar order and used on the same building, a separate statement for lien is made for it and it is made a separate cause of action on foreclosure, the two transactions are separate, and a notice of lien, filed within ninety days after the furnishing of the last item, is insufficient to establish a lien as to the first item.—*National Life Ins. Co. v. Ayres*, 202.
2. **City Contract -- Defense**—Where an agreement between a city contractor and a material man, filed with the board of public works, provided that 30 per cent. of the certificates issued for the work done by the contractor be assigned to the material man as collateral for payment of material, and when the material used in each section into which the work

Small figures refer to subdivisions of Index. The others to page of report.

MECHANICS' LIEN Continued

TO

MORTGAGES

was divided was paid for, the certificates issued and assigned for such section should be surrendered, it was no defense, to an action by the material man against the city to establish a mechanic's lien for material used in constructing subsequent sections, that plaintiff had been assigned sufficient certificates to pay his entire claim, and had surrendered the same, such certificates having been assigned to secure material used in previous sections which had been paid for.—*Iowa Brick Co., v. City of Des Moines*, 272.

3. **BURDEN OF PROOF**—*As to Payments Made*—Where the city's defense to an action for mechanic's liens for materials furnished a contractor was that it had paid out all the contract price on other claims, the burden of proving that such claims were legally filed was on the city, because such fact rested peculiarly within its own knowledge.—*Idem*.
4. **Improvements**—*What Constitutes*—Lumber furnished for the purpose of building an office and putting in floors and ceiling, an office in the building, and putting in stairs and elevators, and erecting a shed behind the building, was furnished for "improvements," within Code, section 3089, giving a lien for lumber furnished for improvements on land.—*National Life Ins. Co. v. Ayers*, 202.

MINORS—See JUDGM., ²² to ²⁵.

MISCONDUCT—See APPEAL, ¹⁶; RAIL., ¹⁶, ¹⁷.

MISTAKE—See ADVERSE POSSES.; STAT. LIM., ¹, ⁸

MODIFICATION OF JUDGMENT—See ALIMONY; JUDGMENT., ¹⁴.

MORTGAGES—See FORECLOSURE; INSUR., ⁹; RAIL., ⁹, ¹⁰.

1. **Conversion of Mortgaged Chattels** — *Estoppel*—A mortgagee is not estopped to assert the mortgage against one purchasing the mortgaged chattels from the mortgagor, where the purchaser has suffered no damage.—*Gardner v. Roach*, 413.
2. **Evidence**—*Burden of Proof*—Plaintiff in an action for conversion of wheat on which he held a mortgage, having produced and given in evidence the notes and mortgage, and stated credits to which the mortgagor was entitled, defendant has the burden of proving payment.—*Idem*.
3. **Right to Make Partial Payment**—*After Default*—A mortgagor, entitled to pay part of the mortgage debt, and to demand a release of a proportionate amount of the land "during the pendency of the mortgage," cannot avail himself of such

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MORTGAGES Continued

TO

MUNIC. CORP.

right after default, and after action has commenced.—Baldwin v. Benedict, 741.

MOTIONS—See PRACT., ²¹, ²².

MUNICIPAL CORPORATIONS—See MECH. LIENS, ², ³.

1. **Ordinance—IMPLIED REPEAL BY STATUTE—**Revised Ordinances Dubuque, chapter 31, declares the manner in which the streets may be improved as authorized by its special charter. Acts Twenty-second General Assembly, chapter 20, 14, makes the provisions of Acts Twentieth General Assembly, chapter 20, declaring the manner in which streets of cities of the first class shall be improved, applicable to cities organized under special charter, and section 2 provides that nothing contained therein shall repeal any law in existence granting authority to cities under special charter, but that existing laws shall be deemed cumulative. *Held*, that since the authority of the city of Dubuque to improve its streets was derived from its special charter, and the authority to exercise it in a particular manner was derived from the ordinance, the improvements of streets in such city under such ordinance, before the adoption of an ordinance to carry into effect the provisions of Acts Twenty-second General Assembly, chapter 14, was valid, though a different conclusion might have been reached were it not for said section 2 of said act of the Twenty-second General Assembly.—Altman v. City of Dubuque, 105.
2. **APPROVAL BY MAYOR ESSENTIAL—**Revised Ordinances Dubuque, chapter 31, requires that all street improvements shall be by resolution of the city council. Acts Twentieth General Assembly, chapter 192, requires that a mayor of a city of the first and second class shall sign or veto and return resolutions passed by the city council before the same shall take effect or be in force, and Acts Twenty-second General Assembly, chapter 2, makes such provisions applicable to cities organized under special charter. *Held*, that such ordinance was mandatory, and hence, where a mayor of such city organized under special charter failed to sign or veto and return to the city council for further action a resolution authorizing street improvements, the city had no power to make the same, and assess a special tax for the payment thereof.—*Idem*.
3. **Mayor Elected After His Predecessor has Failed to Approve Ordinance—**The city council had no power to authorize or

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MUNIC. CORP. Continued

- direct a mayor subsequently elected to sig such ordinance after the term of office of the mayor in office at the time the ordinance was enacted had expired.—*Idem*.
4. **Paving—PUBLISHING OF PAVING NOTICE—Presumptions**—Where plaintiff admitted that a notice for a street improvement was published in two city papers, and there was no evidence that it did not appear for the requisite number of days, the court will presume that it was published for the required time.—*Arnold v. City of Ft. Dodge*, 152.
 5. **SUFFICIENCY OF NOTICE**—Under Acts Twenty-third General Assembly, chapter 14, section 3, as amended by Acts Twenty-fourth General Assembly, chapter 12, requiring cities to publish a notice of any public improvement for not less than ten days in two newspapers of said city stating the "extent of the work" and "the kind of material to be used," etc., a notice of a proposed improvement to curb and gutter a street, which stated that bids would be received to curb and gutter both sides of Market street, from Second street to Division street, except where the same is already curbed and guttered, and that the work must be done in accordance with plans and specifications on file in the city clerk's office was sufficient to satisfy the requirements of the statute in a case where neither a fraud, lack of competition, or excessive cost is charged.—*Idem*.
 6. **Notice by General Ordinance**—Where a general city ordinance provided that the cost of street improvements should be assessed against the abutting property, an objection by the plaintiff that she had no notice that the cost of guttering and curbing the street in front of her lots was to be assessed against them was unavailable.—*Idem*.
 7. **Opportunity to Resist Assessment**—Where a resolution passed by the city council ordering an assessment to curb and gutter a street in front of plaintiff's lots, and a schedule describing the lots, and the amount assessed against each, and a certificate of the city engineer as to the correctness of the schedule, and a notice fixing the date on which the city council would hear grievances and make all equitable corrections, were all published as required by law, and the plaintiff saw these notices before the date set by the council to hear grievances, an objection that she had no opportunity to be heard in opposition to the assessment was untenable.—*Idem*.

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MUNIC. CORP. Continued.

8. **PAVING SPECIFICATIONS—*Estoppel***—Where the material and work used in guttering and curbing a street were in substantial compliance with the contract, and the plaintiff's husband as her agent, was frequently present as the work progressed, and the only change he suggested was made, plaintiff was estopped from questioning the validity of her assessment on the ground that the work was not done in accordance with the specifications.—*Idem*.
9. **Public Improvements—RECONSTRUCTION AND REPAIR—*Assessment for Permanent Sidewalk***—Code, section 779, confers on cities power to provide for the construction, reconstruction, and repair of permanent sidewalks, and to assess the cost thereof on abutting lots, and that such improvements shall be made only on petition of the owners of the majority of the frontage. Section 780 provides that cities shall have power to repair sidewalks without notice to owners and assess the expense thereof against the property. The city engineer caused a brick walk, which had been out of repair, to be taken up, a new trench dug, and an entirely new foundation of sand laid therein, and a large number of new brick to be used in relaying the walk. *Held*, to constitute a reconstruction, and not a repair of the walk, which the city was authorized to make without a petition of the majority of the frontage, and that, hence, assessment therefor was void.—*Farraher v. City of Keokuk*, 310.
10. **CUTTING DOWN STREET—*Responsibility for Damage***—Where, as a result of cutting down a street on which no grade had been established, the abutting property is made more difficult of access, a retaining wall is rendered necessary, and shade trees standing in the street are injured or destroyed, the injury is such as to entitle the property owner to recover damages of the city.—*Richardson v. Webster City*, 427.
11. ***Prima Facie Evidence of Liability***—Evidence that work in cutting down a street was done by the city street commissioner, that it extended over a period of six weeks, and that the city disposed of some of the dirt, is sufficient to make a *prima facie* case against the city, as the party responsible for the injury caused to the abutting property by such work.—*Idem*.
12. **Respondeat Superior—NEGLIGENCE OF FIREMEN**—While driving along the street of defendant city, plaintiff's horse, being frightened by the employes of defendant's fire department,

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MUNIC. CORP. Continued

who were handling the city's fire apparatus and wantonly ringing a bell attached to it, ran off, injuring plaintiff, who sued to recover for her injuries. *Held*, that there could be no recovery, as the employes were public officers engaged in a public duty at the time of the accident.—*Saunders v. City of Ft. Madison*, 102.

13. **Resolutions—EFFECT OF VETO UPON WARRANT DRAWN UPON ALLOWANCE—*Mayor's Refusal to Attest Same***—Plaintiff presented a claim for damages for personal injuries to the city of D, the allowance of which was recommended by the damage committee of the city council. The council adopted the report, which the mayor vetoed. *Held* that, since the adoption of the committee's report was a resolution requiring the mayor's assent, or passage over his veto, as provided by Code, section 685, the mayor properly refused to sign a warrant for the amount of the claim drawn on the city treasury, as required by Revised Ordinances City of Des Moines, section 36, no further action having been taken by the council after the mayor's veto.—*Stutzman v. McVicar*, 40.
14. **Sidewalks—INJURY FROM—*Evidence***—In an action against the city for injuries caused by a defective sidewalk, it is not error to admit testimony of a witness as to others having also tripped and fallen over loose boards in the sidewalk; such evidence being offered solely on the question of notice to the city of the defective condition of the walk.—*Wilberding v. City of Dubuque*, 484.
15. **CONFLICT OF EVIDENCE—*Equivalents***—Where, in a suit against the city for injuries caused by a defective sidewalk, defendant requests an instruction that, if the only defect was merely a loose plank which was only out of place occasionally, it must have been observable by all passers-by, for such a length of time that the city, in the exercise of ordinary care, would have discovered it in time to repair it before plaintiff's accident, it is not error to refuse such instruction; the evidence as to the condition of the walk being conflicting, and the court having fully and properly instructed thereon.—*Idem*.
16. **PERMANENCY OF INJURY—*Future Pain and Suffering***—Where, in a suit against the city for injuries caused by a defective sidewalk, the evidence shows plaintiff's injuries to be probably permanent, and that he would suffer therefrom at times, the jury may consider future pain and suffering, if

MUNIC. CORP. Continued

any, and the probable permanency of the injuries under the evidence, and allow the plaintiff compensation therefor.
—*Idem.*

17. KNOWLEDGE OF DEFECT AS MATTER OF LAW—Where a traveler had no knowledge of a particular defect in a sidewalk, and could not have discovered it by simply glancing at its surface, such knowledge cannot be inferred as a matter of law.
—Cox v. City of Des Moines, 646.
18. NOTICE OF INJURY—*Insufficiency*—Under Code, section 3447, barring action for injuries sustained by reason of a defective street or sidewalk in ninety days, unless written notice, specifying the time, place, and “circumstances” of the injury be served on the city within sixty days from the happening of such injury, where an action was brought more than ninety days after an injury occurred, and the only notice served on the city was a letter from plaintiff’s attorney notifying the city that he had a claim for adjustment for an injury which occurred to the plaintiff at the intersection of Church street and Clarinda avenue on the evening of April 21st, a verdict for defendant was properly directed, since the notice contained none of the “circumstances” of the injury.—Giles v. City of Shenandoah, 83.
19. *Same*—Since the statute applies to injuries resulting from defective “streets or sidewalks” the notice is required for injuries occurring in a ditch in a street.—*Idem.*
20. *Object of Notice*—The object of the statute is to apprise the city of the location of the defect and circumstances attendant upon the injury so that its liability may be investigated while the facts are fresh and also that it may ascertain what evidence there may be of conditions then existing and the character of the injury, while witnesses are at hand.
—*Idem.*
21. STATUTES—*Construction*—Code, section 1051, requiring notice within thirty days to a city of injury from a defective street, being found in chapter 14 relating to cities under special charter, and having been adopted by the same general assembly as the first section of such chapter (Code, section 933), expressly providing that the provisions of the chapter shall apply only to cities acting under special charter, cannot be construed to apply to other cities.—Harvey v. City of Clarinda, 528.

MUNIC. CORP. Continued

TO

NEGLIGENCE

22. **Waterworks**—PROPOSITION SUBMITTED AT ELECTION—*Sufficiency of Proposition*—Under Code, section 720, providing that no waterworks shall be authorized, established, or erected by a town unless a majority of the legal electors voting thereon vote in favor of the same, the construction of waterworks by a town is not authorized by a majority vote at a special election upon the question, "Shall the town issue bonds for the purpose of erecting, maintaining, and operating a system of waterworks?"—Brown v. Carl, 608.
23. **CONSTRUCTION OF PROPOSITION**—The proposition, "Shall the town issue bonds, not to exceed the sum of \$3,500, for the purpose of erecting, maintaining, and operating a system of water-works?" is misleading, in that it limits the amount to be used for maintaining as well as constructing the water-works, and its submission to a vote of the people cannot be made the basis of authority for construction of such works.—*Idem*.

MURDER—See CRIM. LAW, ²³ to ²⁹.MUTUALITY—See CONTRACTS, ¹⁷.NATIONAL BANKS—See STAT. LIM., ¹².

NEGLIGENCE—See ANIMALS, ⁴; INSTRUCT., ⁴; MUN. CORP., ¹²; RAIL., ¹¹ to ¹⁵.

1. **Jury Question** —NEW TRIAL—The evidence showed that plaintiff was injured by her horse becoming frightened by defendant's employe removing a black canvas cover from an express wagon while it was standing near a public highway; that he pulled the top towards the rear of the wagon, and that as he did so, and as the center thereof passed over the rear of the wagon, the front of the cover rose in the air. *Held*, not such a failure of evidence as to defendant's negligence as would authorize setting aside a verdict finding defendant guilty of negligence.—Peterson v. Adams Express Co., 572.
2. **OF MASTER**—*Jury Question*—The owner of a building maintained a platform elevator in its building. Two sides were uninclosed, and between two of the floors an iron girder extended into the elevator shaft in close proximity to the elevator platform, when it was on a level with the girder. The elevator shaft was dark, so that the protruding girder could not be readily seen, and plaintiff, in the course of his employment, while taking a truck load of goods up on the elevator came in contact with the iron girder and was in-

NEGLIGENCE Continued

jured. Defendant did not warn plaintiff of the existence of the girder, or of the danger therefrom. *Held*, that the question whether or not defendant was guilty of negligence was one for the jury.—*Olson v. Hanford Produce Co.*, 347.

3. DEFECTIVE HIGHWAY—*Jury Question*—It is not negligence, as a matter of law, for one to use a highway having a defect in it.—*Harvey v. City of Clarinda*, 528.
4. Contributory Negligence – *Jury Question*—Plaintiff while employed by defendant, and while engaged in his duties under such employment in taking merchandise from one floor of defendant's building to another on an open platform elevator, stood on such elevator so that his heel and foot extended over the side of the platform, and was injured by coming in contact with an iron girder which extended from a wall near the elevator to a point in close proximity to the platform when it passed such girder. Plaintiff did not know of the presence of the girder, and the elevator shaft was dark, so that the presence of such girder could not be readily ascertained, and defendant had never warned plaintiff of its presence, and of the danger therefrom. At the time of the accident, plaintiff's mind was distracted by the necessity of attending to the big truck load of merchandise he had on the elevator, to prevent its falling off. *Held*, that it could not be said as a matter of law that plaintiff was guilty of contributory negligence, but such question should have been submitted to the jury.—*Olson v. Hanford Produce Co.*, 347.
5. SAME—Where the act of defendant's agents frightened a horse which plaintiff was driving, resulting in her injury, plaintiff cannot be charged with contributory negligence, if she was exercising reasonable care, though the horse was unsafe, providing she did not know it.—*Peterson v. Adams Express Co.*, 572.
6. PROXIMATE CAUSE—*Co-operating Negligence*—The fact that in producing an accident the fright of plaintiff's horse operated with the negligence of defendant city, consisting in the narrowness of an embankment, used as an approach to a railroad crossing, the precipitate character of the banks, and the absence of railings, does not prevent defendant's negligence from being a proximate cause of the accident, and rendering it liable therefor.—*Harvey v. City of Clarinda*, 528.

N^o 10. INST.**NEGOTIABLE INSTRUMENTS.**

1. **Bona Fide Holder — Notice**—Where plaintiff, in purchasing a negotiable note for value before maturity, makes some inquiry as to the paper, his negligence in not ascertaining that the note was obtained by fraud and was without consideration will not charge him with notice, it being the undisputed evidence that plaintiff bought the note in the usual course of business, before due, for full value and without notice of any infirmity.—*Central State Bank v. Spurlin*, 188.
2. **FRAUD**—Where a note given for the right to sell a patent rupture cure was immediately transferred by the payee to the business manager of the rupture cure company, on whose representations as to the character of the cure the note was executed, an instruction that if the note was obtained by false representations of such manager, it became invalid when it passed into his hands, even though it might have been valid in the hands of the original payee, was not erroneous, since the manager was not a mere indorsee, but a party to the transaction.—*Wray v. Warner*, 64.
3. **KNOWLEDGE**—An instruction that the plaintiff obtained the note sued on in the ordinary course of business for a valuable consideration, without knowledge of the representations made by his business manager in obtaining it, does not contradict another instruction that the evidence was conflicting as to whether plaintiff had knowledge of the alleged want of consideration for the note; since the first instruction refers to a knowledge of alleged fraud, and the second to a knowledge of the want of consideration.—*Idem*.
4. **INSTRUCTIONS—Harmless Error**—Where the plaintiff claimed to have purchased the note sued on for value, before maturity, an instruction that the note was transferred to plaintiff immediately after its execution was not prejudicial to plaintiff.—*Idem*.
5. **RECOVERY BY INDORSEE**—Under Code, section 3070, providing that on failure of the consideration given for a note the holder cannot recover a greater sum than he paid for it, with interest and costs, where the evidence showed that plaintiff was a *bona fide* holder of such note, but did not show what he paid for it, an instruction that he could recover only a dime or a dollar was proper.—*Idem*.

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N^o. INST. Continued

6. **Evidence—RATIFICATION OF SIGNATURE**—Where, in a suit on a note, defendant denies the genuineness of his signature, it is not error to instruct that, before the jury could find that defendant ratified the signature in a conversation with plaintiff's witness, they should find from the evidence that defendant knew what note he was talking about; the pleading containing no admission that he knew and was talking about the note in suit, and the witness's testimony leaving the matter to inference.—*Renner Bros. v. Thornburg*, 515.
7. **STANDARD OF COMPARISON**—Where expert evidence is resorted to by defendant to prove his purported signature to the note sued on to be a forgery, defendant's testimony that he wrote the standards used for comparison, before the date of the forged instrument, is sufficient proof of the genuineness of the standards.—*Idem*.
8. **Liability of Endorser—Pleading**—Where a bank which is neither drawer nor drawee pays a check upon a forged endorsement of the name of the payee and then endorses to the drawee bank, "for collection," which has funds of the drawer in its hands and pays said check upon presentation, the bank which endorsed for "collection" is liable to the drawee bank for which the latter has paid it, though drawee did not present the check to drawer for payment or certification to the genuineness of endorsements.—*Citizens Nat. Bk. v. City Nat. Bk.*, 211.
9. **Negotiability—Describing Payee as "Trustee"**—The addition of the word "trustee," following the name of a payee in a note, does not destroy its negotiability, as such word is *descriptio personae*.—*Central State Bank v. Spurlin*, 188.
10. **Satisfaction by Renewal—Jury Question**—A company gave a note guaranteed by F. by an indorsement thereon. At maturity thereof the company, in consideration of the same indebtedness, gave the bank another note for the same amount, paying interest in advance. It was agreed at this time between the bank and company that the bank should retain the original note till the renewal note was indorsed as the original, but it does not appear that the subject was again mentioned, though on maturity of the renewal note another note was given, and interest paid in advance, and so on, until maturity of the last note given, and till nine or ten renewal notes were given, the original note being retained without any endorsement of satisfaction. It does not appear

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that F. knew of the renewal notes, or was called on to endorse them. *Held*, that it was a question for the jury whether, in taking the later renewal notes, the parties acted on the agreement, or abandoned it, and extended the credit, as evidenced by the renewal notes, to the company alone.—*German S. B'k v. Bates' Imp. Co.*, 432.

NEW TRIAL—See JUDGM., ²¹

Misconduct of Juror—Where a juror, during the trial, stated in a conversation with a stranger that he was convinced of defendant's guilt, and that it would require a great deal of evidence to change his mind, when told that evidence might be introduced that would change his conclusions, remarked that it could not be done, such remarks, though a violation of his duty, did not indicate a personal bias or prejudice, but were merely an expression of his opinion that the evidence pointed so strongly to defendant's guilt that the defense would be unlikely to overcome it, and, no harm appearing to defendant, it was not error to refuse a new trial therefor.—*State v. Baughman*, 71.

NOTES AND BILLS—See ATTORNEY FEES, ¹; NEGOT. INSTRU.

NOTICE—See APPEAL, ⁴⁶ to ⁴⁷; ATTORNEY, ², ³; ESTATES OF DEC., ⁴; FORECLOSURE, ⁴; INSUR., ¹²; LAND. AND TEN., ¹¹; MUN. CORP., ⁴ to ⁸, ¹⁷, ¹⁸, ¹⁹, ²⁰; NEGOT. INST., ²; PRACT., ²².

OBJECTIONS—See APPEAL, ²⁰; EVID., ²²; FRAUD. SALE, ⁶; PRACT., ²².

ORIGINAL NOTICE—See INSUR., ¹.

PARENT AND CHILD—See DEEDS, ² to ⁶; GUARD. AND WARD, ¹¹, ¹².

PARTIAL PAYMENTS—See CONTRACTS, ¹².

PARTIES—See PRACT., ²⁴.

PARTITION—See JUDGM., ⁴, ⁷.

1. Allowance for Improvements —One who claims property sought to be partitioned, as sole owner, should be allowed, on partition, for all improvements made in good faith.—*Moy v. Moy*, 161

2. RECOVERY OF RENTS AND PROFITS—One seeking the partition of property in possession of defendant, claiming sole ownership, cannot recover for rents, no evidence being given as to the rental value of the premises, or of any rent actually received of any considerable amount.—*Idem*.

PAYMENT—See MORTGAGES, ²; STATUTE OF LIM., ⁴.

PEDDLERS—See CONSTIT. LAW, ⁶.

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PERJURY—See CRIM. LAW, ²⁰.PLATS—See DEDICAT., ².PLEA AND JUDGMENT—See PLEA, ².PLEA AND PROOF—See INSUR., ⁷, ¹¹; PRACT., ²⁶.

PLEADING—See EVID., ²⁶; FRAUD. CONVEY., ⁹; INSUR., ⁶; LAND. AND TEN., ¹; LIBEL, ¹⁰; PRACT., ¹⁶; STATUTE OF LIM., ⁵.

1. **Amendments—Discretion**—To refuse to permit plaintiff to amend his petition to enlarge the amounts of his claim against an estate, after the lapse of three years, and just before the case is submitted to the jury, is not an abuse of discretion.—*Dubuque Lumber Co. v. Kimball*, 48.
2. **Construction—PRAYER**—A prayer in plaintiff's bill to enforce payment of a balance due on a land contract, asking a decree requiring defendant to pay the amount due by a certain day, and, in default thereof, that plaintiff have judgment, is a demand for a money judgment, enforceable by execution, and not for a decree of specific performance.—*Dorr v. Alford*, 278.
3. **Counts—Practice**—Where one count of a petition was based on a warranty that hogs were free from disease, and a second count on false and fraudulent representations made to induce such sale, and the court charged that the measure of damages was the same on each count, it was not error to instruct that, if the jury found for plaintiff on one of the counts, he could not recover on the other, as the two causes of action grew out of the same transaction.—*Brush v. Smith*, 217.
4. **OF INSUFFICIENT ALLEGATIONS**—Where, in an action by a taxpayer to enjoin the enforcement of a local assessment, he alleges facts which, if true, do not entitle him to relief, a denial of such facts in the answer will be treated as surplusage.—*C., M. & St. P. Ry. Co. v. Phillips*, 377.
5. **Denial—OF CORPORATE CAPACITY**—Where, in an action by a corporation, it pleaded its corporate capacity under existing laws, defendant's denial of want of information with reference thereto is insufficient to require plaintiff to prove such capacity.—*Fisk v. C. M. & St. P. Ry. Co.*, 402.
6. **OF SIGNATURE**—Where, in a suit on a note, defendant denies the genuineness of his signature, and plaintiff pleads ratification thereof in reply, it is not error to instruct that the jury must find that defendant either signed the note, or authorized the signature, or ratified and adopted it; defendant having also denied authorizing the signature, and an

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instruction having been given, at plaintiff's request, that, if the defendant did not deny or repudiate the signature when the note was presented for payment, the jury might infer that he had authorized it.—*Renner Bros. v. Thornburg*, 515.

7. *Petition of Denial*—Where plaintiff sues on a note, and the defendant denies the genuineness of his signature thereto, under oath, and plaintiff then amends his petition by pleading defendant's ratification and adoption of the signature, and no copy of the note is attached or incorporated in the amendment, and the record shows that the amended petition was filed before the answer, it is not error to instruct that the burden of proving the genuineness of the signature is on the plaintiff, though defendant has also filed an unverified general denial to the amendment, since defendant is not required to repeat his verified denial of the genuineness of the signature.—*Idem*.
8. *Estoppel by—CONSISTENCY—Specific Performance and Annulment of Contract*—Where plaintiff prayed for specific performance of a contract, thereby adopting the same, and asserting rights thereunder, and nowhere in her pleadings, intimated that such contract was invalid, she is estopped to claim that such contract is void because of a confidential relation existing between the parties thereto.—*Shropshire v. Ryan*, 677.
9. *Plea and Judgment* —Where plaintiff in a mortgage foreclosure suit did not ask to be allowed for certain taxes paid on the property, in his petition, the allowance thereof in the decree of foreclosure was erroneous.—*Fisk v. C., M. & St. P. Ry. Co.*, 402.
10. *Reply—ALLEGATIONS IN*—Allegations setting up a new cause of action or matters already in issue are not permissible in a reply.—*Ellis v. Soper*, 631.
11. *Setting out Evidence* —An amendment to an answer which pleads evidence is properly stricken.—*Stewart v. Anderson*, 329.
12. *Statute of Limitations—AVOIDANCE*—That statute of limitations has not run because of non-residence must be pleaded.—*Adams v. Holden*, 61.
13. *Stricken off* —In an action to recover money retained for delay in completing a building contract, a reply, denying a

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conversation with defendant's intestate tending to show an intention to treat a provision in the written contract relating to damages for such delay as a penalty and not liquidated damages, was properly stricken from the files, as pleading evidence.—*Kelly & Mahon v. Fejervary*, 693.

14. **Supplement Petition**—After a decree ordering an assessment to be made on members of a mutual life association to pay a policy has failed to produce sufficient funds, a supplemental petition setting out the facts, and asking judgment against the association was authorized by Code, section 3641, declaring that facts material to the issue, which have happened since the filing of the former pleading may be set up in a supplemental petition.—*Christie v. Iowa Life Ins. Co.*, 178.
15. **SAME**—Such supplemental petition was not invalid, in that it stated the same cause of action as the original petition, since it asked relief not given by the former decree and in so far as it contained restatement of matter found in the original petition, it but set out a history of the litigation.—*Idem*.
16. **Warranty**—It is not enough that a warranty is set out, but reliance upon it must appear from the pleadings. *Shambaugh v. Current*, 126.

POLICE POWER—See **BOARD OF HEALTH**, 3.

POOR.

1. **Support of —Liability of Relatives**—Under Code, section 2217, placing the liability to support a poor person on his grandfather, "in the absence or inability of nearer relatives," it is not enough to show that certain poor persons have no children; that their mother has not the ability to support them; that their father "has abandoned his wife," and has not property subject to execution; but it must be shown that he is absent or unable to support the children.—*Johnson County v. Stratton*, 421
2. **Support of Insane Pauper — LIABILITY FOR—Husband and Wife**
—Code, section 2297, declares that public support of insane persons shall not release relatives liable therefor, and that those *legally bound for the support of the patient* shall be responsible to the county for sums paid by it for hospital

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expenses of such insane persons. Section 3165 declares that a wife shall be liable for family expenses. *Held*, that since a wife was not generally liable for her husband's support, and keeping her husband in an insane hospital was not a family expense, she was not liable to the county therefor.—*Blackhawk County v. Scott*, 191.

PRACTICE—See ASSIGNMENTS, 2; ATTORNEY'S FEES, 2, 3; CONTRACTS, 1; CRIM. LAW, 43; EVID., 2, 43; GEN. ASSIGN.; PLEADING, 2; RAIL., 16, 17; WARRANTY, 4.

1. **Correction of Record on Appeal**—*Jurisdiction of District Court*—Under Code, section 4127, authorizing the trial court to make such orders as will secure a perfect record, such court has jurisdiction to correct a notice of appeal filed in the district court by sustaining a motion to strike therefrom what purports to be the names of attorneys for defendant, on the ground that their signature had not been, in fact, appended to such notice.—*State Sav. Bk. v. Ratcliffe*, 662.
2. **MOTION TO CORRECT**—*Timely Filing*—Where no time is fixed within which to make application for the correction of a notice of appeal, only laches or equitable reasons can defeat it.—*Idem*.
3. **Court and Jury**—DIRECTING JURY AFTER RETIREMENT—*Invading Province of Jury*—Where, in an action against a city for injuries cause by a defective sidewalk, the jury, after retiring, propound to the court the question whether the existence of a defective sidewalk for five months, daily traveled by city officials and all classes of people, would constitute presumptive notice to the city of its defective condition, and the court answered that it would, and then repeats a former instruction that, where a defect has existed for such a length of time that city officials should have discovered it in the use of ordinary care and diligence, the law presumes notice to them thereof, the answer as a whole, and in connection with the question, is not erroneous as an invasion of the province of the jury.—*Wilberding v. City of Dubuque*, 484.
4. **REMARKS OF JUDGE ON CREDIBILITY**—*Non-Prejudicial*—In an action for breach of marriage promise, a juror, on return of the jury into court to ascertain a certain fact, inquired whether defendant's statement concerning intercourse with plaintiff before she went to a certain place should be con-

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- strued as affecting other portions of his testimony. One of his attorneys remarked "that it could not affect his credibility," to which the court, in an undertone, responded, "It might," and then instructed them that they were the judges of the credibility of the witnesses. *Held*, that no prejudice could have resulted from the remark of the court, as he gave no opinion as to whether the circumstance affected defendant's credibility—*Stewart v. Anderson*, 329.
5. **SAME**—A remark of the trial court that nothing material had been elicited from a certain witness, is held not to be prejudicial.—*State v. Keenan*, 293.
 6. **Directed Verdict**—*Waiver of Submission to Jury*—Though both parties move for a verdict, neither, as against the motion of the other, waives the right of submission to a jury.—*German S. B'k v. Bates Imp. Co.*, 432.
 7. **Instruction**—**CURING ERROR**—Error in the admission of evidence was cured by an instruction that such evidence was so indefinite and uncertain that the jury should not give it any attention.—*Rice v. Appel*, 454.
 8. **SAME**—A charge that "dry goods" meant in a commercial sense, textile fabrics, cottons, woolens, linens, silks, laces, etc., that textile fabrics are those woven, as carpets, or capable of being formed by weaving, and that a "textile" fabric is one made by weaving, does not cure the error of excluding evidence that "dry goods" excluded caps, clothing and the like. The jury could not say with certainty whether, under the charge, clothing and caps made of woolen goods should or should not be included in "dry goods."—*Wood v. Allen*, 97.
 9. **By Withdrawal of Issue**—The withdrawal of an issue of fraud and false representations inducing a sale, from the jury, cures any errors occurring in the prior admission of evidence adduced to sustain such issue and, in the absence of request, the court need do no more than to withdraw the issue.—*Idem*.
 10. **EQUIVALENTS**—In a suit for damages against a railroad company for narrowing an undergrade passage to plaintiff's spring and damaging the spring, a refusal to instruct that if plaintiff had been in possession of the spring and passage for 26 years, to the notice of defendant, the latter was liable, is not error, where the court instructed that, if defendant had knowledge of plaintiff's rights at the time

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- the spring and crossing were injured, plaintiff could recover.—*Oliver v. B., C. R. & N. Ry. Co.*, 221.
11. **HARMLESS ERROR**—An erroneous instruction that plaintiff could not recover on one count of a petition if a recovery was had on another count, was harmless, where the jury found for the defendant on one count, only.—*Brush v. Smith*, 217.
 12. **REQUESTING INSTRUCTION**—*When no Waiver of Defects in Pleading or Admission of Testimony*—In an action by a widow to recover of her deceased husband's brother for board and washing furnished such boarder while he lived in her husband's family, defendant asked an instruction that plaintiff, to recover, must show that there was a special contract between defendant and plaintiff to pay for such board and washing. *Held*, that the asking of such instruction, done for the purpose of meeting prior rulings in taking testimony, did not preclude defendant, on appeal, from raising the question that plaintiff's petition failed to allege such contract, or that the court erred in admitting testimony offered to prove the same.—*McClintic v. McClintic*, 615.
 13. *Same*—In the absence of request, a failure to give an instruction relating to the burden of proof is not error.—*Harvey v. City of Clarinda*, 528.
 14. *Same*—An instruction being good as far as it goes, a party desiring more explicit ones should ask therefor.—*Gardner v. Roach*, 413.
 15. **WITHDRAWAL BY ANOTHER JUDGE**—Where manifestly erroneous instructions are given by the trial judge, and, after the submission of the cause, the judge, on leaving the county seat, requests another judge of the district to receive the verdict, and also to recall the jury and withdraw the erroneous instructions, there is no such irregularity as to constitute reversible error.—*Renner Bros. v. Thornburg*, 515.
 16. **Intervention**—**GENERAL DENIAL**—*Burden of Proof*—A general denial to a petition in intervention, on foreclosure, puts interveners on proof of every fact essential to authorize the relief sought.—*Hitt v. Sterling-Goold Mfg. Co.*, 458.
 17. **Judge and Court**—**ACTS IN VACATION**—Where defendant addressed a motion to the court and filed it with the clerk, the judge had no power to act on it in vacation.—*Young v. Rann*, 253.

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18. **Misconduct of Juror**—Statements of a juror in a personal injury case as to the condition of the sidewalk claimed by plaintiff to be defective, made to his fellow jurors after the final submission of the cause, from what he claims is his own knowledge, constitutes misconduct justifying a new trial.—*Wilberding v. City of Dubuque*, 484.
19. **SAME**—In an action for injuries against a city, it is not error to refuse the defendant a new trial because a juror stated in the jury room, after the final submission of the case, that the city had settled another case of one thousand eight hundred dollars; the statement not seeming to have received any attention from the other jurors, and not being shown to have prejudiced the city.—*Idem*.
20. **PRESUMPTION AS TO MISCONDUCT**—Where jurors are cautioned as to their duties, no presumption arises that the caution has been disregarded.—*Idem*.
21. **Motion to Discharge** —Under Code, section 3948, authorizing a defendant to set up facts showing that the debt or property sought to be charged in garnishment is exempt from execution, or is, for any other reason, not liable for plaintiff's claim, by suitable pleadings, a defendant is entitled to claim a discharge of the garnishment, by motion, on the ground that the property was exempt; that the garnishee was never served with notice, and that the situs of the debt was in another state.—*Greaves & Co. v. Posner*, 651.
22. **NOTICE OF MOTION**—Delay in serving notice of motion to re-tax is not prejudicial, when the court below found that adverse counsel had previous knowledge of the filing of the motion and agreed to take it up without service of notice.—*Bank v. Jordan*, 326.
23. **Objections Sustained**—**OBJECTION**—*Error Without Prejudice*—Though objections to questions are sustained, no prejudice results to the party propounding them, where the witness answers, and his answers are allowed to stand.—*Marple v. Ives*, 602.
24. **Parties**—**MAKING ASSIGNOR PARTY**—*Where Needless*—The defendant, in an action on an account by the assignee thereof, cannot require the assignor to be made a party to the suit, as any defense against the assignor might be made against the assignee.—*Shambaugh v. Current*, 121.
25. **Plea and Testimony**—**STRICKEN PLEADING**—Where, in an action to recover money retained as damages for delay in complet-

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- ing a building contract, a reply, denying that plaintiff had any conversation with defendant's intestate relating to whether or not such damages were intended as a penalty, had been stricken from the files as pleading evidence, such reply was no ground for excluding evidence of such conversations at the trial, because a pleading stricken before trial cannot control the taking of testimony.—*Kelly & Mahon v. Fejervary*, 693.
26. **Special Interrogatories**—It was not error to refuse to submit a special interrogatory to the jury concerning the authority of an agent, when the act of the agent sought to be repudiated had been ratified.—*Fleishman v. Ver Does*, 322.
27. **SAME**—Where defendant claimed that an understanding she was to pay a balance on an account was made after settlement, and without consideration, and plaintiff claimed it was made before settlement, it was not error to refuse to submit an interrogatory so framed that the answer would not have indicated whether such understanding was before or after settlement, since such answer would not have found an ultimate fact, determinative of the case.—*Idem*.
28. **Striking Part of Pleading**—*Harmless Error*—Striking out one of two divisions of an answer, each setting up a breach of warranty, if erroneous, is not prejudicial.—*Shambaugh v. Current*, 122.
29. **Transfer to Law Side**—*After Amendment Tendering Equitable Issue*—Where plaintiff's petition, alleging a copartnership between himself and defendant, and asking for an accounting, was amended so as to recover under a written contract, it was not error to refuse plaintiff's motion to transfer the entire case to the law side of the court, after defendant had filed an equitable answer in effect asking for an accounting and that another party be brought in, as under defendant's answer an equitable issue was tendered, which could not be tried by a jury.—*Irwin v. Cooper*, 728.
30. **Trial**—**EVIDENCE**—Where, on appeal to the district court from a decision of the Board of Supervisors awarding the county printing to the defendant, the defendant introduced no evidence in the district court as to the number of his subscribers, a judgment awarding the printing to him was erroneous, since there was no presumption in his favor, without evidence.—*Young v. Rann*, 253.

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31. **Verdict**—**PASSION AND PREJUDICE**—Where the amount of the recovery is not limited by the instructions, it cannot be said, from the size of the verdict alone, that it is the result of passion or prejudice.—*Connors v. Chingren*, 437.
32. **EXCESSIVE VERDICT**—*Reduction by Court*—Where, in an action for damages for fraud in a real estate trade, certain property was taken for two thousand dollars, when it was only worth four hundred dollars, it was not error for the court to reduce an excessive verdict for plaintiff, and enter judgment for one thousand six hundred dollars damages and ninety dollars accrued interest.—*Idem*.

PRACTICE SUPREME COURT—See **APPEAL**.**PRESUMPTIONS**—See **DEEDS**, ², ⁶, ⁷, ⁸; **PRACT.**, ²⁰; **WILLS**, ⁵.**PRINCIPAL AND AGENT**—See **AGENCY**.**PRINCIPAL AND SURETY**—See **SURETIES**.**PRIORITIES**—See **ATTACH.** **LEVY**, ²; **RAIL**, ⁹, ¹⁰; **SUBROGATION**.**PROSTITUTION**—See **CRIM. LAW**, ²⁶.**QUIETING TITLE**—See **JUDGM.**, ⁹; **EQUITY JUR.**, ².

Deed Fraudulently Obtained — Where plaintiff, who had no previous interest in certain real estate, discovering a defect in the affidavit on which the original notice was given in a suit to foreclose a mortgage thereon by publication, secured from the mortgagor a quitclaim deed on a fraudulent representation of his agent that it was wanted to fix up a title, and the mortgagor in executing such deed, believed that he was making the title of the purchaser at foreclosure good, and later executed a second quitclaim deed to the purchaser at such sale, in an action to quiet title, plaintiff had no rights under the deed so fraudulently obtained.—*Stillman v. Rosenberg*, 369.

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1. **Damages**—**BURNING OF MEADOW**—*Measure of Damage*—Where a meadow is destroyed by fire, the measure of damages is the cost of restoring it to its former condition, and its rental value as such until it is restored.—*Bradley v. Ia. Cent. Ry. Co.*, 562.
2. **SAME**—Where a meadow is destroyed by fire, the plaintiff is entitled to recover the value of the growing grass destroyed, in addition to damages for injury to the meadow.—*Idem*.
3. **HEDGES**—Where a hedge is destroyed by fire, the measure of damages is the difference between what the property is

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worth with the hedge and what it is worth without it.—*Idem.*

4. **Evidence**—Where the cost of restoring a meadow destroyed by fire was in issue, evidence that plaintiff had rented it for a certain sum per acre before he began to remake it was properly excluded as immaterial—*Idem.*
5. **SAME**—Where the damages resulting from the burning of an old meadow were in issue, it was proper to exclude evidence by defendant to show that it was more profitable for plaintiff to have plowed it up and planted other crops.—*Idem.*
6. **CROSS-EXAMINATION**—Where, in an action for the burning of plaintiff's dwelling house, defendant's expert witnesses had testified to the cost of building a house the same size and dimensions as the one destroyed, it was not error to permit plaintiff to ask them on cross-examination as to the cost of a building of different size and shape from the one destroyed, since plaintiff was not bound to confine his inquiries to a building of the same proportions as that described by them in defendant's examination in chief.—*Enix v. Iowa Central Ry. Co.*, 748.
7. **EXCLUSION**—Where a fire set by defendant's locomotive reached plaintiff's meadow after burning another meadow nearby, and it was shown that the grass on the two meadows was of equal height, it was reversible error to exclude evidence offered by defendant to show that the roots of the grass in the meadow burned first were not injured.—*Bradley v. Ia. Cent. Ry. Co.*, 562.
8. **NEGATIVE STATEMENTS**—Evidence of witnesses who were near a train at the time of an accident at a crossing, that they heard neither the whistle or bell till the train passed the crossing, is not merely negative.—*Mackerall v. Omaha & St. L. Ry.*, 547.
9. **Mortgage**—**JUDGMENT LIEN**—*Priorities*—Code 1873, section 1309, made a judgment against a railroad company for injuries, a lien on the property of the corporation situated in the county where the judgment was obtained, superior to mortgages or trust deeds executed since July 4, 1862. Plaintiff obtained a judgment against a railroad company before a decree foreclosing a mortgage on its property, given since such date, was rendered. The judgment was afterwards re-

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- versed and a new trial had, but the property was sold before the recovery of a second judgment. *Held*, that the judgment was not a lien on such property.—*Winter v. Iowa Central Ry. Co.*, 342.
10. **SAME**—Where a decree foreclosing a mortgage on railroad real estate provides that it shall not affect liens or equities on the property prior to the mortgage foreclosed, but that the property be sold, and the proceeds applied to the payment of such preferred claims, the proceeds take the place of the property, and the latter cannot be subjected to the payment of a judgment for injuries subsequently rendered in an action then pending, which, under Code, 1873, section 1309, would have been a lien superior to the mortgage, if rendered before the decree of foreclosure.—*Idem*.
11. **Negligence—Jury Question**—The mere fact that a little dust and grease appeared on the top of the steam chest of an engine after a run of thirty miles, causing defendant's brakeman's foot to slip, was not sufficient evidence of negligence to warrant the submission to a jury of defendant's liability for injuries sustained by the brakeman.—*Hall v. Iowa Central Ry. Co.*, 523.
12. **NEGLIGENCE AFTER DANGER IS PERCEIVED**—Where a workman on a railroad track, on an earth embankment, the sides of which began to slope at the end of the ties of the two tracks thereon, stepped back from the north track, out of the way of the train thereon, going east, onto the south track, and was struck by the engine of a train going west on that track, the engines having passed one hundred feet east of that point, the persons in charge of the west bound train cannot be held to have been negligent after his peril was, or by the exercise of care, should have been known to them, they having given the danger signal when he was seen to approach their track, as, if he stepped backward in time to have crossed their track before their engine reached that point, they had a right to assume that he would cross it, and, if he did not step back in time to cross it, they did not have time in which to avoid the accident after his peril was or could have been known.—*Fisk v. C., M. & St. P. Ry. Co.*, 492.
13. **CONTRIBUTORY NEGLIGENCE—Jury Question**—Plaintiff, in approaching a railroad crossing, stopped his team, and looked and listened, when one hundred feet from the track. He

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then sat down with his back to the north, and drove slowly down a descent to the track. There was an embankment which obstructed his view of the track till within twenty feet of it. His attention was largely taken up with the bad condition of the road, and he did not notice a train coming from the north, till the team was going on the rails, and he was struck and injured. *Held*, not sufficient to show contributory negligence as a matter of law.—*Mackerall v. Omaha & St. L. Ry.*, 547.

14. **SAME**—A workman on an earth embankment just wide enough for the two railroad tracks on it, with only sufficient space between them for safe passage of cars, but down the north side of which he could have gone to a place of safety, continued at his work of scattering cinders (no foreman being present) till a train thereon going east was near him, when, without looking, he stepped back on the south track and was struck by a train thereon going west; the engines having passed one hundred feet east of that point. *Held*, that he was guilty of contributory negligence, notwithstanding a rule of the company that "trackmen must keep close watch of passing trains, and when anything wrong is discovered, immediately signal the engineer or trainman, and use every effort to stop the train."—*Fish v. C., M. & St. P. Ry. Co.*, 392.
15. **"Operation of Railroad" Defined—Setting Out Fire**—A fire set by section men in burning the grass along a railroad right-of-way is not set out in or caused by operating a railway, and, therefore, in an action for damages sustained from allowing said fire to escape, the burden is not cast on the defendant to show its freedom from negligence in allowing the fire to escape and in failing to put it out, under Code 1873, section 1289, providing that, in an action for damages from a fire set out or caused by the operating of any railway, it shall only be necessary for plaintiff to prove injury to, or the destruction of, his property.—*Connors v. Chicago N. W. Ry. Co.*, 384.
16. **Practice—MISCONDUCT IN ARGUMENT**—Where plaintiff's attorney in an action against a railroad, in which its employes were witnesses, stated in argument that if the employes of a railroad company did not testify as the company desired they would be discharged, but such language was held improper, and was withdrawn, the argument did not constitute prejudicial error.—*Mackerall v. Omaha & St. L. Ry.* 447.

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17. *Misconduct of Counsel*—Where, in an action for the destruction of a dwelling house by fire from defendant's engine, defendant contended that the fire was the result of a defective chimney, and was not caused by defendant's engine, and there was no evidence as to the condition of the engine, the fact that plaintiff's counsel, in his argument, referred to the engines as "old fire traps" and the court, on objection thereto, stated that "he thought the remark not objectionable; that counsel had a right to call them "fire traps," did not constitute prejudicial error, justifying a new trial.—*Enix v. Iowa Central Ry. Co.*, 748.
18. *Taxation*—ASSESSMENT OF RAILROADS—*Construction of Sewer*—Laws Twenty-fifth General Assembly, chapter 7, section 11, authorizes cities divided into sewer districts to construct sewers, and levy the entire cost thereof on all the taxable property within such district. Mason City ordinance, No. 77, section 5, provides that the cost of constructing any sewer in any sewer district shall be a charge on all real estate. McClain's Code, section 2016, 2019, provides for a valuation of the property of railways, for the purposes of taxation, by the executive council of state, based on the aggregate value of their entire right of way and real estate used for depot purposes, and all personal property used in operating the road, in improving the rolling stock, and for the transmitting to the auditor of each county through which the road runs of a statement of the pro rata distribution on the basis of the number of miles in such county of the assessed value of the whole property. No means are provided for a separate valuation of the real and personal property of a railroad. *Held*, an assessment of property of a railroad to pay for the construction of a sewer in a sewer district of the city of Mason City, based on the valuations made by the executive council of state, is void, as being in part a tax on personal property for the construction of the sewer.—*C., M. & St. P. Ry. Co. v. Phillips*, 377.

RATIFICATION—See NEGOT. INST., 4.

REDEMPTION—See STAT. LIM., 4.

REFORMATION.

Estoppel to Demand —Where mortgages, deposited with trustees to secure debenture bonds of a certain company, were executed so as to render the person signing them personally liable, purposely to conceal the fact that they were

REFORMATION Continued

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SALE

obligations of the company, such person, though holding merely the naked legal title to the property pledged, and receiving no consideration for signing the obligations, is without standing in a court of equity to ask a reformation of the mortgages so as to be relieved from personal liability, even though all the facts had been known to the trustees and purchasers of the bonds.—*Riegel v. Ormsby*, 10.

RELEASE—See GUARD. AND WARD, ¹³; SURETIES, ².

RES ADJUDICATA—See JUDGMENTS, ¹ to ⁹.

RESCISSION—See GUARD. AND WARD, ¹⁴; SALES, ⁶.

RESIGNATION—See SCHOOLS.

RESUBMISSION—See CRIM. LAW, ¹⁵.

RETAXATION—See ATTORNEY'S FEES, ².

REVIEW—See APPEAL, ²².

SALE.

1. **Acceptance**—One to whom a corn harvester was delivered on a contract that if it worked well he should keep it, and pay for it, accepts it by loaning it to another for use, and such other person using it, without the knowledge or consent of the seller.—*Hensen v. Beebe*, 534.
2. **SAME—Broker's Commission**—Plaintiff, employed by defendant to find a purchaser for a stock of goods, found a person who was willing to buy if real estate which he had was accepted in payment. Defendant made a written proposition in which he agreed to accept such real estate in part payment, provided the purchaser, among other things, furnished an abstract showing title in him. The purchaser accepted the offer, but failed to furnish an abstract. *Held*, that the acceptance was not such as to entitle plaintiff to his commission, as having found a purchaser able and willing to buy on the terms proposed.—*Marple v. Ives*, 602.
3. **Conditional Sale —VALIDITY—Seller Retaining Title by Recorded Bill of Sale**—Under Code 1873, section 1922, declaring that no conditional sale shall be valid against a creditor of the buyer in actual possession thereunder, without notice, unless in writing, executed by the seller, and acknowledged and recorded the same as a chattel mortgage, a bill of sale wherein title to the goods was retained by the seller till full payment, executed by the seller, and acknowledged and recorded, was sufficient to protect the seller's right to such goods against a subsequent creditor of the buyer, though such instrument was not executed by the *buyer*.—*Nat. Cash Reg. Co. v. Schwab*, 605.

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SCHOOLS

4. **VENDOR'S LIEN**—Where the vendor sold wagon scales to the defendant, on condition that title should not pass until the price was paid, but, before receiving his money, allowed them to be set up for use on defendant's lot, and the lot was sold at sheriff's sale on a judgment against defendant, the purchaser at such sale, who had no notice of the vendor's lien until after he had taken possession under the sheriff's deed, was entitled to the scales, as against the vendor.—*Thomson v. Smith*, 718.
5. **Rescission of Sale—*Fraudulent Representations***—Where the buyer of goods, in making a statement of his assets and liabilities, falsely stated the amount of his liabilities to be less than they actually were, knowing that the seller had requested such statement as a basis for determining as to his credit, the seller, if he relied on the statement, on discovering such falsity, may rescind the sale, and recover the goods, though the buyer intended to pay for the goods, and did not intend to defraud the seller thereof.—*Morris v. Posner*, 335.
6. **Vendor's Lien —*WAIVER—Evidence***—The fact that a vendor of land entered into a written contract, and accepted a note for the purchase price, was not sufficient to constitute a waiver of his right to a lien for the same, in the absence of clear proof that such was the express agreement of the vendor.—*Zook v. Thompson*, 463.

SATISFACTION—See **JUDGM.**, 25; **NEGO. INST.**, 10.

SCALES—See **FIXTURES**.

SCHOOLS.

1. **Teachers—*ABANDONMENT OF CONTRACT***—The fact that a teacher under contract to teach in a certain district handed in his resignation at the close of a term, drew the pay that was due him, and delivered up the key of the school house on demand of the district board, is insufficient to show an abandonment of the contract where he afterwards, and before the commencement of the next term, withdrew his resignation prior to its acceptance.—*Courtwright v. Ind. Dist.*, 20.
2. **DISCHARGE OF**—In an action by a teacher against a school district for damages for breach of contract, it appeared the plaintiff tendered his resignation, but withdrew it before it was accepted, and the district board there-

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TO

SETTLEMENT

upon formally accepted the resignation. *Held*, that the claim of defendant that, if there was no resignation before the board, its action was an order of discharge, under Code, section 2782 (Code 1873, section 1734), authorizing district boards to discharge teachers for incompetency, and after an investigation at a meeting convened for that purpose, at which the teacher may be present, and make his defense, and that plaintiff, not having appealed from the order of discharge to the county superintendent, as provided by Code, section 2818 (Code 1873, section 1734), could not maintain the action—was untenable, it not appearing that any complaint was made against plaintiff, or that he was called on to make any defense.—*Idem*.

3. RESIGNATION—*Acceptance*—The tender of a resignation by a teacher, under contract to teach in a certain district, being a mere offer, is not binding on either party to the contract until accepted, and it may be withdrawn at any time before it is acted on by the district board.—*Idem*.

4. SAME—The fact that a tender of a resignation by a teacher under contract to teach in a district was handed to the president of the district board, and retained by him, did not constitute an acceptance thereof, where it remained for the board to act on the tender.—*Idem*.

SEDUCTION—See CRIM. LAW., ³⁸ to ⁴²; EVID., ¹⁹; JUDGMENT, ²³.

SETTLEMENT.

Directing Verdict—PRESUMPTION OF CONTINUITY—Where plaintiff sought to recover against an insane person on notes payable to his order, and a partnership was shown to have existed between the parties for some years prior to the execution of the notes, and there was no direct testimony that the partnership had ceased to exist, and some of the notes grew out of the extension of other notes, all being signed by defendant, and indorsed by plaintiff at a bank to secure loans, and plaintiff and defendant were always together when loans were made and paid, it was not error to refuse to direct a verdict for plaintiff, since the presumption raised by giving a note, that all prior matters are settled, does not arise in all cases, and was negatived by such evidence, a partnership shown to exist being presumed to continue till dissolution is shown.—*Watters v. McGreavy*, 538.

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STAT. OF LIM.

SIDEWALKS—See MUN. CORP., ¹⁴ to ²².SIGNATURE—See PLEAD., ⁶, ⁷; CONTRACTS, ¹⁹; NEGOT. INST., ⁶, ⁷.SPECIFIC PERFORMANCE—See CONTRACTS, ²⁰.

STATUTE—See CONSTIT. LAW, ¹, ², ⁹; CORPOR., ⁶; MUN. CORP., ¹, ²¹;
STAT. LIM., ⁹, ¹⁰.

Pertaining to Remedy—CHANGE IN—*Effect on Suits Pending*—

McClain's Code, section 1852, provides that, in actions for taxes erroneously or wrongfully assessed for the construction of ditches or drains, it shall only be necessary to show that the lands so taxed were not benefited. Code, section 1947, provides that it shall not be competent in such actions to show that the lands assessed were not benefited by the improvements. *Held*, that, since these statutes pertain exclusively to the remedy, the second, being in force when a petition for the recovery of taxes wrongfully assessed was filed, applied thereto, and, where the sole ground of recovery alleged was that the lands were not benefited, a demurrer to the petition was properly sustained.—*Allerton v. Monona County*, 560.

STATUTE OF FRAUDS—See EVID., ⁴⁴, ⁴⁵.

STATUTE OF LIMITATION—See PLEAD., ¹².

1. **Accrual of Action for Mistake**—Under Code, section 3448, providing that actions for relief because of mistake shall not accrue until the mistake is discovered, where a tax voted in aid of a resident bridge company is by it assigned to a foreign company, which cannot legally receive such aid without the tax payer's knowledge, who pays the tax believing the resident company is to receive it, an action for its recovery because of such mistake does not accrue until a discovery of the mistake.—*Baird v. Omaha & C. B. & B. Co.*, 627.
2. **Claims Against Estates**—Where a guardian invested funds of her ward in a note and mortgage without authority of court, the statute limiting the time of filing claims against the estate of one deceased does not apply to the filing of a claim for the amount of such mortgage with the executor of such guardian subsequently dying, because such claim was contingent on the acceptance of the investment by the ward on coming of age, and also, because the ward was not a creditor of the estate of her said guardian until coming of age.—*Easton v. Sommerville*, 164.

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STAT. OF LIM. Continued

3. **New Action —EXTENSION OF TIME—**Revised Statutes Illinois, chapter 83, section 25, provides that, if a plaintiff commences a new action within one year after a nonsuit, it shall have the effect of reviving the first. Plaintiff's action was dismissed for want of prosecution. and six months given him to reinstate it. He commenced a new action more than one year but within eighteen months after such dismissal, and after his original cause of action was barred. *Held*, that the six months given for reinstatement did not extend the statutory time for bringing a new action, and, hence, plaintiff's action was barred.—Adams v. Holden, 54.
4. **Partial Payment—What is Not—**Application of rents and profits of lands by a grantee in possession under deeds operating as mortgages, to the payment of the debt secured, will not operate to take a suit by the grantor to recover the lands, from the bar of the statutes of limitations, no voluntary payment by the grantor having been made; it not appearing that grantee ever acknowledged the transaction to be a trust or that grantor made any payment accepted by grantee or that within the period of the statute there was any recognition of grantee's rights; and there being, at all events, no showing of the amount of rents and profits received or when they were received.—Adams v. Holden, 54.
5. **Pleading—**The bar of the statute of limitations relating to claims against the estate of a deceased person must be pleaded, if relied on.—Easton v. Sommerville, 164.
6. **Redemption—Deed as Mortgage—**Where deeds are given, absolute on their face, but accompanied by contracts of defeasance, to be operative if grantor makes payment within a time specified, and the grantee enters into possession thereunder, a suit subsequently instituted by the grantor to recover the lands is in effect, but an action to redeem—such deeds amounting only to mortgages; and, an action to foreclose being barred in ten years, such suit will also be barred in ten years from the time the debt secured by the deeds is due. Ten years from that time the grantee's right of action on the debt and to foreclose grantor's equity of redemption is barred, and, reciprocally, the right to redeem is cut off at the same time.—Adams v. Holden, 54.
7. **RUNNING OF STATUTE—Intervention—**The statute begins to run against an action for wrongful attachment from the time

STAT. OF LIM. Continued

- of attachment, or at least from the time the property was sold in the attachment suit; and not from the time of final judgment in said suit against the plaintiff therein, though the owner intervened therein, and though, after the owner's intervention, he was made a defendant in such suit.—*Smyth v. Peters Shoe Co.*, 388.
8. **SAME**—The *mistake* which will postpone the statute of limitations until discovery need not be a mistake heretofore solely cognizable in equity. That qualification of the statute has reference to fraud.—*Baird v. Ry.*, 630.
 9. **Successive Statutes—Judgment**—The Revision of 1860 barred judgment in twenty years after rendition. While it was in force a debt was made which ripened into judgment after the enactment of the Code of 1873. This fixed the limitation of actions on judgments at twenty years after fifteen years next following their rendition, and section 50 provided that the act should not affect any act done, any right, or suit had or commenced before the act took effect, but such proceedings should be conformed to its provisions as far as consistent. *Held*, that the rights referred to were those arising from obligations, not such as pertain exclusively to remedies, and hence the limitation enacted by the Code of 1873 governed this judgment.—*Norris v. Tripp*, 115.
 10. **SAME**—The legislature may not bar instantly a suit on an existing cause of action, but must give a reasonable time within which to prosecute the same under the new statute; hence Code, 1897, fixing a limitation of twenty years for actions on judgments, cannot apply to a judgment rendered in 1877, since it would wholly prevent action thereon.—*Idem*.
 11. **Trusts**—While one who goes into possession under a deed which is in fact a mortgage, is in a sense, a trustee, the statute of limitations applies to such a trust although there has been no act indicating an intent to disavow it.—*Adams v. Holden*, 54.
 12. **DISAVOWAL OF TRUST**—Where the grantee under deeds operating as mortgages conveys the land to a third person, such act is a disavowal of any trust resulting in grantor's favor after payment of the debt secured, and starts the statute of limitations running in the grantee's behalf against the grantor's suit for an accounting and to recover the lands.—*Idem*.

STAT. OF LIM. Continued

TO

SURETIES

13. **Usury**—**NATIONAL BANKS**—Under Revised Statutes United States, section 5198, providing that twice the amount of unlawful interest paid may be recovered if action be commenced therefor within two years from the time of payment, where such action was not begun till five years after payment the cause of action was barred.—*Talbot v. Sioux Nat. Bk.* 583.
14. **Wrongful Attachment** — *Foreign Corporations*—Code, section 3452, providing, "When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense as though it had arisen under the provisions of this chapter, but this section shall not apply to causes of action arising within the state," applies to an action for wrongful attachment made in another state by a corporation organized under the laws thereof, and residing therein.—*Smyth v. Peters Shoe Co.*, 388.

STOCK AND STOCKHOLDERS—See **ATTACH. LEVY**, ⁴; **CORP.**, ¹ to ⁷; **WITNESSES**, ¹.

STRIKING PLEADING—See **PRACT.**, ²⁰.

SUBROGATION.

Priority—Plaintiff furnished money for the payment of existing liens of record on certain property under an agreement with his borrower that the liens should not be canceled, but should be assigned to one L., to be held by him for the benefit of the loaner until a note and mortgage for the amount loaned was executed, and delivered to plaintiff. The mortgage so given was recorded June 18, 1896. A mechanic's lien on the property was not included in the mortgage, it not being of record, but was filed October 12, 1896. *Held*, that plaintiff was entitled to priority over the mechanic's lien of defendant, as, under the agreement, he was subrogated to the rights of the holders of said prior liens. *Association v. Scott*, 86 Iowa, 432, distinguished.—*National Life Ins. Co. v. Ayres*, 202.

SURETIES.

1. **Payment as Surety**—*Evidence*—Where, on accounting, defendant, attorney, testified that a certain amount was figured as the amount for which he and his partner were held liable as sureties, but did not testify such amount was paid,

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though he said he had made payments and taken receipts, and that another amount was paid on account of a defalcation of plaintiff, of which he offered no other proof nor showed to whom it was paid, the evidence was insufficient to establish such claim.—*Shropshire v. Ryan*, 677.

2. **Release of Part of Security** —Where plaintiff made a loan to defendant for his sole benefit, and received a mortgage from defendant, and also certain security from a third person, to whom defendant paid a part of the money in satisfaction of his debt to him, plaintiff's release of the latter security does not affect defendant's liability.—*Farmers' Loan & Trust Co. v. Turner*, 738.

TAXATION—See *DEDIC*, 3; *EQUITY JUR.*, 4; *STAT LIM.*, 1.

1. **Conveyance to Avoid — PAVING**—Plaintiff conveyed a fifteen-foot strip abutting a street to P., who was a cousin of plaintiff's divorced wife, to avoid a paving assessment. Plaintiff had no negotiations with P., and the latter never asked for a deed, or agreed to accept one, and paid nothing therefor. Plaintiff sent the deed to P., and it was returned to plaintiff's divorced wife. Plaintiff had it recorded at her request, and returned it to her. For whom she was acting does not appear, all inferences indicating that it was for plaintiff. Plaintiff paid taxes on the property, ostensibly for P., but without P's request, and without informing anyone interested in P.'s estate of the fact. *Held*, that the conveyance was but an artifice, which did not pass title, and did not exempt plaintiff's property adjoining such strip from assessment.—*Ranson v. City of Burlington*, 77.
2. **SAME**—While one may lawfully dispose of his property to escape taxation, even of a general character, the law will not uphold any mere manipulation under the guise of a disposition, the only effect of which is to defeat the tax.—*Idem*.
3. **INJUNCTION AGAINST TAX FOR IMPROVEMENTS**—*Contractor not Necessary Party*—In an action by a tax payer to enjoin the collection of a tax assessed for special improvement, on the ground that it is unlawful as to him, the contractors who are to perform the work are not necessary parties to the action.—*C., M. & St. P. Ry. Co. v. Phillips*, 377.
4. **Public Improvement—WHEN TAX FOR LEGAL—Benefits of Tax**—Where a city is authorized to make an improvement in a

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TO

TRUSTS

certain district, and assess the cost on all real estate within the district, the fact that the improvement will not be of any benefit to an individual owner of real estate in such district is no reason why the tax should not be enforced as to him.—*Idem*.

TEACHERS—See SCHOOLS.

TENANCY AT WILL—See LAND. AND TEN., ¹⁰, ¹¹.

TITLE.

Insufficient Evidence—In partition by the widow of C., the defendant, one of C.'s sons, claimed title under an oral contract with deceased, acquiesced in by the plaintiff, under which he undertook to care for and support them during life. The parents, defendant, and another son, had lived together on the premises for several years after the date when the alleged agreement was claimed to have been made, plaintiff doing the housework and the father and other son working on the place. Continuously during those years the other son shared the crop. The building and stock was insured in the name of all three, and the taxes were assessed in the name of the father and the receipts ran to him. Improvements were made, but there was no evidence that the money paid therefor did not come from the profits of the land, the manufacture of tobacco, and the care of bees by the father. Defendant had paid the administrator \$125 and plaintiff \$25, which they supposed to be rent, but which he afterward claimed to be a debt due, and other members of the family denied knowledge of the alleged contract. There was evidence that the father had stated to several that he had turned the place over to defendant, and other evidence that he stated the farm would be defendant's when he was through with it, and that he expected him to have it. *Held*, that the evidence was not sufficient to support defendant's claim.—*Chew v. Holt*, 362.

TRANSCRIPTS—See APPEALS, ⁷, ²⁴.

TRANSFER—See PRACT., ²⁹.

TRIAL—See PRACT., ²⁰

TRUSTS—See FRAUD. CONV., ¹¹; GUARD. AND WARD, ¹; INSUR., ¹⁹; STAT. LIM., ¹¹, ¹².

1. *Evidence—Husband and Wife*—When land was bought husband was able to pay for it. The wife had some money then, but it appears that she loaned some after the land was bought.

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It is found that she contributed to the purchase to some extent. Title was taken in the name of the husband and so remained for over thirty years. The wife was appointed his guardian upon allegation that he had undertaken to rent his land and that there was danger of squandering his estate, real and personal. As his administratrix she gave the names of his heirs but did not assert any ownership in the land or assert the claim of advanced purchase price. *Held*, that this was not overcome by evidence of alleged declarations of the husband such as, "He told me plainly she put her money that she had in the place there. He said for safe keeping." "About the time they bought he told me 'I and Jane can buy that farm,' specifying her money with his." "He and Mrs. Scott had enough to buy the farm and it was better to buy it than to put the money on interest." And "He said if she put her money in they could buy the place. They had bought and she had paid all her money in."—*Rotter v. Scott*, 31.

2. **EXPECTATION OF REPAYMENT**—Where money contributed by a wife towards the purchase of land conveyed to her husband was given to him to be used and controlled by him as his own, and without expectation of repayment, or having a special interest in the land on account thereof, no trust therein resulted in her favor.—*Idem*.
3. **Fair Dealings —Burden of Proof**—Plaintiff assigned a claim in suit to defendant, who contracted to deed property to her; it being provided that out of the balance of the amount collected a fee should be paid to plaintiff's attorney, and certain debts of her husband settled. Four years thereafter a supplementary contract was executed, authorizing defendant and his law firm, which did not exist at the time of the assignment, to apply the proceeds of such claim to all claims held by them against plaintiff or her husband, and providing for a personal attorney's fee for defendant. There was no new consideration, and it is not shown that plaintiff had knowledge as to the claims against her husband. Afterwards, the original contract was canceled, and all demands between defendant and his law firm and plaintiff and her husband settled. No written statements of charges and disbursements was ever given to plaintiff, and her testimony showed that there was no open and full accounting. At the time of the supplementary contract and settlement defendant was plaintiff's attorney, employed in collecting the

TRUSTS Continued . TO WARRANTY

claim assigned to him in trust for plaintiff. *Held*, that there was not sufficient proof to overcome the presumption of fraud as to the supplementary contract, arising from the trust relation existing between the parties.—*Shropshire v. Ryan*, 677.

4. **Trust Funds**—An executor deposited some \$3,000 of funds belonging to his estate with a bank in which he was a partner. The assets of the bank were, for a time after the deposit, largely augmented, to which deposits generally, including this one, contributed. No new loans were made after this deposit, with bank funds, and, after a time, deposits shrank and losses were incurred on overdrafts, largely exceeding said \$3,000 deposit. The bank failed and the assignees received private property of the bankers, some \$450 in cash, said overdraft and bills receivable, largely uncollectable, which were obtained before said deposit was made. *Held*, though there is a presumption that funds received by a bank better its assets, the presumption is rebutted here and that it does not appear the deposit had been preserved and came to the assignees in such form that it can be treated as a preferred trust without injury to the rights of general creditors. *Plow Co. v. Lamp*, 80 Iowa, 722, distinguished and criticised. *Bradley v. Chesebrough*, 126.

ULTRA VIRES—See INSUR., ¹², ¹⁸.

USAGE—See EVID., ⁴⁶.

USURY—See STAT. LIM., ¹⁸.

Independent Loans—Where usury was the issue, evidence of another and usurious loan made between the same parties, but having no connection with the note in question, was inadmissible.—*McGuire v. Kenefick*, 147.

VACATION—See JUDGM., ²⁰, ²¹, ²⁴.

VENDOR'S LIEN—See SALES, ⁴, ⁶.

VERDICT—See PRACT., ²¹, ²².

WAIVER—See FRAUD, ⁶; JUDGMENT, ¹⁴; PRACT., ⁶, ¹², ¹³.

WARRANTY—See PLEAD., ¹⁶.

1. **Breach of—Construction of Contract**—Where a separator and stacker are sold under a contract providing that, "if the stacker cannot be made to fill the warranty, it shall be removed from the separator," a failure to remove the stacker is not a breach of the contract; both stacker and separator having failed to work.—*Robinson & Co. v. Berkey & Martin*, 550.

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2. **CONSTRUCTION—Breach as to Parts of Machine**—A provision in an order for a machine that the failure of the warranty as to any separate part or attachment of the machine shall not affect the liability of the purchaser, except as to such part or attachment, does not apply to a part or attachment furnished with the machine at a gross price.—*Idem*.
3. **Estoppel to Rely on Both Oral and Written** — Where a party does not rely on a written warranty but pleads that the writing was only a part of the contract and that verbal representations were made, he cannot complain that the court treated the language of a written contract for sale of cattle which spoke of them as "thoroughbred," as a mere description of the cattle rather than a warranty that they were thoroughbred. One who attempts to establish oral warranty is in no position to urge that there was a written warranty on the same subject.—*Shambaugh v. Current*, 121.
4. **Practice—Instructions**—The question being whether a warrantor had reasonable time in which to give notice that he would do nothing further with the article warranted, it was, perhaps, erroneous to submit what was a reasonable time, as a pure question of fact. It is ordinarily a mixed one of law and fact. It should have gone to the jury with certain limitations, but the failure to do this, is waived by failure to request such action.—*Robinson & Co. v. Berkey & Martin*, 550.
5. **Time to Replace —Jury Question**—A warranty given on the sale of certain machinery provided that if the machinery could not be made to fill the warranty, plaintiffs should either furnish another machine, or return the purchase price. Plaintiff's expert, on September 21st, left the machine as a failure, and on the next day plaintiff's agent was notified of the fact. Nothing further was done or offered by plaintiffs, and on September 26th, defendants rescinded the contract. *Held*, that the question whether plaintiffs were given a reasonable time in which to replace the machine was properly left to the jury. *Manuf. Co. v. Spitznogle*, 54 Iowa, 36, distinguished.—*Robinson & Co. v. Berkey & Martin*, 550.

WATERWORKS—See MUN. CORP., ²², ²³.**WILLS.**

1. **Construction of—Interest Devised**—Where testator gave all his property to his wife, to use, enjoy, and manage as she, in

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her judgment saw fit, the wife took a fee, and not a simple life estate.—In re Barrett's Will, 570.

2. "DYING WITHOUT HEIRS" CONSTRUED—A testator devised certain lands to two granddaughters in severalty, subject to the condition that if they "should die without heirs" the lands devised should "revert back" to such of his heirs as might be living at that time. The will also provided that the several devises therein made should take effect after the testator's death. *Held* that, as the estates could not revert until vested, and could not vest till the testator's death, the "dying without heirs" contemplated was after and not before, the testator's death, and, hence, the granddaughters took at the testator's death conditional estates only, subject to being determined by their dying without heirs; and that title to the lands would not be quieted in the granddaughters against other heirs. Stress is laid, too, upon the fact that the testator's age and feeble health made it unlikely that he should have contemplated that any of his grandchildren would die before him.—Jordan v. Hinkle, 43.
3. Copy—*Evidence*—A paper offered as a copy of a destroyed will is not satisfactorily proved by witness saying, when it was read over to him on the trial, "That is right, as near as I can recollect.—McCarn v. Rundall, 406.
4. Election by Husband —Where a surviving husband not only filed an election to take under the will of his deceased wife, but received benefits under the will, and, though served with notice of the filing of a final report of the executrix and of her application for discharge, made no objection thereto, he will be deemed to have made an election.—Brightman v. Morgan, 481.
5. Presumptions—No presumption arises from the making of a will that the testator left means out of which legacies bequeathed might be paid.—Association v. Gerlinger, 296.
6. Revocation —*Evidence of Intent*—Intention to revoke a will is shown by testimony of witness that testatrix called for it, and wanted it destroyed and done away with, and that he tore it up by her direction.—McCarn v. Rundall, 406.
7. MENTAL CAPACITY TO REVOKE—*Scope of General Finding That Will was Invalid*—A general finding that a will, objected to on the grounds of mental incapacity, undue influence, and fraud and duress, was not a valid will, does not show that

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WITNESS

there was lack of mental capacity, so as to invalidate revocation of a prior will, destroyed on the same day that the second was executed.—*Idem*.

8. **Subscribing Witnesses—Number Required**—Code, section 3274, requiring two witnesses to subscribe a will, is not satisfied by one witness subscribing it and others being present.—*Idem*.

WITNESS—See CRIM. LAW, ⁴²; EVID., ⁴⁷; WILLS, ⁸.

1. **Attachment—PAYMENT OF FEES**—Code, section 1298, declares witnesses in criminal cases may demand their fees in advance, unless the subpoena was issued under order of the judge; and section 4662 that a witness not paid his fees as required shall not be compelled to attend. *Held*, that where defendant in a criminal case subpoenaed a witness and the subpoena did not show that it was issued under an order of a judge, and witness demanded his fees, which were not paid and witness failed to attend, the court properly refused to issue an attachment compelling attendance.—*State v. Keenan*, 286.
2. **Competency—STOCKHOLDERS**—A stockholder in a corporation is not a person interested in the result of a contest between two creditors, to each of whom the corporation is indebted, within Code, section 4604, rendering such a person incompetent as a witness to a transaction with one deceased.—*Hitt v. Sterling-Goold Mfg. Co.*, 458.
3. **Husband and Wife — DIVORCE**—One divorced from his wife is not incompetent as a witness, under Code, section 4604, providing that the evidence of a husband of a party to an action or of a person interested in the result to a personal transaction with one deceased shall not be received against the executor or administrator of deceased; nor under section 4606, providing that neither husband nor wife shall be a witness against the other.—*Idem*.
4. **SAME**—Under Code, section 4607, which prohibits the testimony of husband and wife as to communications made by one to the other even after the marriage has been terminated, it is, at least, doubtful whether the testimony of a divorced husband concerning an agreement made by him as agent of his wife, to withhold a mortgage belonging to her from record, is inadmissible, for such testimony may not involve any communication between husband and wife.—*Idem*.

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